Supreme Court, U.S.
FILED

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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CIG EXPLORATION, INC.,
Petitioner,

v.

UTAH STATE TAX COMMISSION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of Utah

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PETITION FOR A WRIT OF CERTIORARI

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September 12, 1995

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QUESTION PRESENTED

Whether the Utah Supreme Court erred in refusing to provide a meaningful remedy for *ad valorem* taxes that were collected on the basis of natural gas rates that the Federal Energy Regulatory Commission had determined to be erroneously charged and in ignoring the FERC's order requiring petitioner to refund the incorrectly collected rates.

PARTIES TO THE PROCEEDING

The following were named defendants and appellees in this action:

Utah State Tax Commission

Uintah County, Utah

Glen McKee, Lorrin Merrell, and Max Adams, Uintah County Commissioners

Donna Richens, Uintah County Treasurer

DISCLOSURE STATEMENT PURSUANT TO RULE 29.1

CIG Exploration, Inc., is a wholly owned subsidiary of Colorado Interstate Gas Company, whose ultimate parent company is The Coastal Corporation. CIG Exploration, Inc., has no subsidiaries.

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UTAH STATE TAX COMMISSION, *et al.*,
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Petition for a Writ of Certiorari to the Supreme Court of the State of Utah

---

PETITION FOR A WRIT OF CERTIORARI

CIG Exploration, Inc., hereby petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Utah in this case.

OPINIONS BELOW

The opinion of the Utah Supreme Court is reported at 897 P.2d 1214 (Utah 1995) and is included in the Appendix at 2a-9a. The opinion of the Utah Supreme Court denying rehearing is not reported and is included in the Appendix at 1a. The opinion of the Uintah County District Court is not reported and is included in the Appendix at 10a-13a.

JURISDICTION

The initial decision of the Utah Supreme Court was entered on March 7, 1995. CIG Exploration, Inc., petitioned for rehearing. The Utah Supreme Court denied

the petition and entered an amended opinion on June 14, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI of the United States Constitution provides, in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of . . . property, without due process of law.

U.S. Const. amend. XIV, § 1.

Section 59-2-1321 of the Utah Code, 1953, provides, in pertinent part:

> Any taxes, interest, and costs paid more than once, or erroneously or illegally collected, may, by order of the county governing body, be refunded by the county treasurer.

Utah Code Ann. § 59-2-1321 (1991).

STATEMENT

A. Factual Background

In the early 1970s there were serious shortages of natural gas throughout the United States as customer demand outpaced supply from proven reserves and production. Natural gas prices, strictly controlled under the Natural

Gas Act of 1938, Pub. L. No. 75-688, 52 Stat. 821 (codified at 15 U.S.C. §§ 717-717z) ("NGA") provided little incentive for further drilling and exploration. The NGA gave the Federal Power Commission, now the Federal Energy Regulatory Commission ("the Commission" or "the FERC"), "the authority to regulate the wholesale pricing of natural gas in the flow of interstate commerce from wellhead to delivery to consumers." *Maryland* v. *Louisiana*, 451 U.S. 724, 748 (1981).

In 1973 Colorado Interstate Gas Company ("CIG"), a natural gas pipeline producer, proposed a program to finance the exploration and development of new sources of natural gas ("Gas Search Program" or "Program"). Pursuant to the Gas Search Program, CIG transferred its production properties and gas leases to a new subsidiary, petitioner CIG Exploration, Inc., which was created to expend Program resources in the exploration and development of new gas reserves. Petitioner then sold CIG natural gas; both "old" gas from existing sources, and "new" gas from the resources it developed. CIG, in turn, sold this gas to its customers.

Funding for the Gas Search Program came in large part from CIG's customers, who agreed to pay higher prices for the "old" gas they purchased from CIG. Under the Program, petitioner spent a minimum of $50.9 million over five years developing additional sources of natural gas. Petitioner was obligated to find and develop a minimum volume of natural gas or it would be required to pay CIG and its customers a penalty. In addition, "new" gas discovered by petitioner was to be dedicated exclusively to CIG's system and its customers. CIG was required to purchase "new" gas from petitioner at the applicable "area rate," or, in the event of deregulation, the area rate in effect prior to deregulation at a set rate of escalation. Through the Program, petitioner discovered new natural gas reserves in several States, including the Natural Buttes Field in Uintah County, Utah, and sold the "new" gas to CIG.

In 1978 Congress enacted the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (codified at 15 U.S.C. §§ 3301-3432) ("NGPA"). The NGPA drastically changed the manner in which the federal government regulated natural gas. Under the NGPA, Congress specified ceiling prices for various categories of natural gas. These ceiling prices were substantially higher than the cost-of-service rates authorized by the FERC under the NGA. The NGPA permitted even higher incentive rates for natural gas produced from high-cost supply sources, such as deep wells and tight sands formations.

After passage of the NGPA, petitioner and CIG agreed to use the NGPA rates, including NGPA incentive pricing, for future transactions involving "new" gas. Because the Natural Buttes Field in Utah is a tight sands formation, petitioner charged CIG the NGPA incentive price for gas produced at this source. During 1981 through 1986, the tax years at issue in this petition, respondents, Utah State officials ("Utah"), annually determined a value on petitioner's underground gas rights at Natural Buttes Field. Utah multiplied petitioner's proceeds from gas sales from the preceding year by 400% in order to determine the assessment value of petitioner's underground gas rights. See Utah Code Ann. § 59-2-201(2) (1988); Utah State Tax Comm'n Admin. Rule R884-10P-1. Utah provided this value to Uintah County which then levied an *ad valorem* tax on this amount. Petitioner timely paid these taxes each year.

B. FERC Proceedings

In 1982, three years after petitioner began charging CIG the NGPA prices for "new" gas, CIG's primary public utility customer, the city and county of Denver, and various other CIG customers, filed a civil action in Colorado State court charging that CIG had violated the Gas Search Program agreement by paying petitioner NGPA prices for "new" gas and NGPA incentive prices for high-cost gas. The parties eventually agreed that this

issue should be resolved by the FERC and the claim was then brought before the Commission in 1983.

In 1984 the FERC ordered evidentiary hearings. *Colorado Interstate Gas Co.*, 26 FERC ¶ 61,422 (1984). The hearings were completed by the end of the year and an administrative law judge ("ALJ") issued an initial decision in the matter in 1985. *Colorado Interstate Gas Co.*, 32 FERC ¶ 63,033 (1985). All parties appealed the ALJ's decision to the Commission. In 1988 the FERC affirmed in part and reversed in part the ALJ's decision. *Colorado Interstate Gas Co.*, 44 FERC ¶ 61,023 (1988) (Opinion No. 306), App. 52a-74a. Applying its contract interpretation criteria, the Commission held that the Program agreement permitted petitioner to charge NGPA prices for "new" gas. The Commission, however, found that petitioner was not authorized to charge CIG incentive prices for tight sands gas under the NGPA because the supplemental pricing agreements between CIG and petitioner for those prices, required by 18 C.F.R. § 271.703 (1986), had not been negotiated with CIG's customers. Therefore, petitioner and its parent company CIG were ordered to refund the difference between the authorized NGPA rate and the NGPA incentive prices it had charged to CIG for tight sands gas.

The Commission denied the parties' motions for rehearing, *Colorado Interstate Gas Co.*, 45 FERC ¶ 61,293 (1988) (Opinion No. 306-A), App. 32a-51a, and clarified that the refund it had ordered did not violate the "filed rate doctrine." *Id.*, App. 47a. "The Commission's remedy enforces the [Gas Search Program agreement] and *is not a retroactive rate change.*" *Id.*, App. 49a (emphasis added).

The parties then entered negotiations concerning the precise amount owned under the FERC's Order and reached a settlement whereby CIG and petitioner would refund $89 million plus interest to CIG's customers. Stipulation and Agreement, App. 23a-31a. The parties

expressly recognized that the $89 million refund included the tight sands gas excess payments *as well as all taxes* petitioner had paid on those excess payments. *Id.*, App. 27a, ¶ 6. The parties agreed that petitioner was to seek recovery of those "Related Costs" from "those persons or entities in receipt of same." *Id.* After considering public comments on the parties' offer of settlement, the Commission held the settlement to be in the public interest and ordered the approval of the settlement *in all material respects*. Order Approving Settlement with Modifications (Aug. 1, 1989), App. 14a-22a. The Commission specifically noted that under the terms it was approving petitioner had "the *right* to seek recovery of and retain . . . related costs from the recipients of those payments." *Id.*, App. 17a-18a (emphasis added).

C. Proceedings Below

Pursuant to the FERC-approved settlement of the rate dispute between petitioner and CIG's customers, petitioner requested a refund from respondents for the excess *ad valorem* taxes they had assessed on the Natural Butte Field based on sales of gas at NGPA incentive prices that the FERC declared were erroneous. Utah law provides that "[a]ny taxes, interest, and costs . . . erroneously or illegally collected, may . . . be refunded." Utah Code Ann. § 59-2-1321 (1991). Respondents denied petitioner's request and petitioner filed suit in the Uintah County District Court on July 5, 1991. The facts underlying the suit were not disputed by the parties. On February 28, 1994, the district court granted respondents summary judgment on petitioner's claim. The district court held that Section 59-2-1321 did not "allow a backward look at valuation errors," but rather applied only to assessments or collections "where the error could objectively be determined at the time of the event." App. 12a.

Petitioner appealed the district court decision to the Utah Supreme Court. The court agreed that Section 59-2-1321 "mandates" the return of "erroneously or illegally collected ad valorem taxes." App. 5a. However,

the Utah Supreme Court agreed with the district court that "erroneous or illegally collected" taxes did not include

> ad valorem taxes paid on the basis of a valuation which was correct as of the time it was made but which is later alleged to have been erroneous due to factors not existing at the time of the valuation.

App. 6a. The court held that the Utah Code

> leaves no room for us to hold that a taxpayer is entitled to a refund of taxes which were paid on the basis of a valuation that was correct as of a given January 1st but which would have been different had the assessor known of a subsequent state of facts.

App. 7a. The court ignored the FERC holding and its impact on the proper treatment of petitioner's gas sales.

After briefing and argument in the case had been completed, this Court held in *Reich* v. *Collins,* 115 S. Ct. 547 (1994), that States must provide "clear and certain" remedies for tax collections contrary to federal law, and that a State provision for the return of taxes "erroneously or illegally assessed" could not unfairly be given a limited construction by the State court to deny the taxpayer post-deprivation relief.

The Utah Supreme Court then amended its opinion to note that its analysis was "not affected by the United States Supreme Court's recent decision in *Reich* v. *Collins.*" App. 7a n.2 (citation omitted). The court claimed that the case was distinguishable from *Reich* because the *ad valorem* tax on petitioner was "correct" when assessed and because events occurring after the collection of the tax did not make that tax collection "erroneous." App. 8a n.2.

REASONS FOR GRANTING THE PETITION

The decision of the Utah Supreme Court raises a recurring and fundamental question with respect to the supremacy of federal law and the due process States must afford taxpayers who have been assessed taxes based upon rates which violate federal law. While petitioner

seeks review of a State court judgment, the underlying pricing decisions of the FERC have a direct bearing on this case. The judgment of the court below fails to give any effect to provisions in the FERC Order that petitioner had the right to seek tax refunds. Utah thus has refused to give adequate consideration to the federal interest in providing an interstate natural gas producer with the right to recover expenses expressly recognized by the agency authorized to regulate natural gas cost structures and consumer costs. Utah has "trapped" the costs petitioner incurred as a result of the excess payments CIG made for high-cost gas and has prohibited petitioner from recovering them as the FERC indicated. Utah's refusal to refund *ad valorem* taxes to which it was not entitled distorts production costs and disturbs the uniform application of the FERC's regulatory scheme mandated by the NGA and the NGPA.

A. The Utah Supreme Court's failure to give any effect to the FERC decision resolving the rate dispute between petitioner and CIG's customers directly conflicts with the Supremacy Clause and with this Court's precedents. Congress has given the FERC " 'authority to regulate the intricate relationship between the purchasers' cost structures and eventual costs to wholesale customers who sell to consumers in other States.' " *Maryland v. Louisiana*, 451 U.S. 724, 750 (1981) (quoting *Northern Natural Gas Co.* v. *State Corp. Comm'n*, 372 U.S. 84, 92 (1963)). The recovery of permissible costs associated with the production of natural gas, which includes the payment of taxes, is " 'obviously within the jurisdiction of the Commission,' " *id.* at 748 (quoting *FPC* v. *United Gas Pipe Line Co.*, 386 U.S. 237, 243 (1967)), and "is still a subject of deep federal concern," *Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Bd.*, 474 U.S. 409, 422 (1986), even after passage of the NGPA. As a result, State interference with Congress's plenary authority over wholesale gas rates and attempts to "trap" federally mandated cost recoveries are preempted. See, *e.g.*, *Mississippi Power & Light Co.* v. *Mississippi ex rel.*

Moore, 487 U.S. 354 (1988) (FERC approval of System Agreements between power companies preempted State attempt to conduct prudence inquiry); *Transcontinental*, 474 U.S. 409 (1986) (State attempt to control manner by which purchasers drew gas from common source preempted); *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986) (FERC approval of Apportionment Agreement between power companies preempted State attempt to use different power ratio for determining State retail rates).

Moreover, federal preemption is not limited to the actions of State regulatory agencies. In *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981), several natural gas producers attempted to recover breach-of-contract damages from a customer in a State court action. Under the contract the producers were authorized to charge Arkla, the customer, the highest price it paid to any other supplier from that particular gas field. The producers subsequently discovered that Arkla had purchased a lease in the gas field and had produced its own gas. The State court held that Arkla had breached the contract by not paying higher prices and awarded damages to the producers in the amount of rate increases it assumed the Commission would have allowed. This Court reversed, holding that pursuant to the "filed rate doctrine" only the Commission could approve rates, *id.* at 577, and that "[i]t would undermine the congressional scheme of uniform rate regulation to allow a state court to award as damages a rate never filed with the Commission and thus never found to be reasonable within the meaning of the Act," *id.* at 579. The Court determined that the State court had "usurped a function that Congress has assigned to a federal regulatory body" in violation of the Supremacy Clause. *Id.* at 582.

In this case Utah has done nothing less by refusing to give effect to the FERC's Order that petitioner could not charge NGPA incentive prices in the State court tax refund proceedings. The FERC expressly held that it had not

made a retroactive rate change. See Opinion No. 306-A, App. 49a. Instead, the FERC determined *nunc pro tunc* the rates petitioner was authorized to charge. *Cf. Harper* v. *Virginia Dep't of Taxation*, 113 S. Ct. 2510, 2517 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.") As a result, in order for respondents legitimately to keep the *ad valorem* taxes assessed on the basis of unauthorized NGPA incentive pricing, the State made a determination that directly conflicts with the FERC decision that petitioner could only charge standard NGPA rates. *Cf. Arkansas Louisiana Gas Co.*, 453 U.S. at 580 (damages award necessarily assumed that Commission would have found rate reasonable). The Utah Supreme Court's repeated assertion that the State's valuation "was *correct* as of the time it was made," App. 6a (emphasis added), makes manifest that the court made the unwarranted determination that it was permissible for petitioner to charge NGPA incentive prices *at that time*. The court gave no effect to the FERC's paramount decision that petitioner was never authorized to charge incentive prices.

Moreover, the FERC's Order indicates that petitioner could seek to recover all related costs it had paid with respect to the excess payments received from CIG. App. 27a, ¶ 6. Because Utah's insistence on keeping the excess *ad valorem* taxes paid by petitioner deprives petitioner of some of its "related costs," Utah has not fully implemented the FERC's Order. That failure conflicts with this Court's precedents concerning preemption, and therefore, this Court should review the decision of the court below.

B. The Utah Supreme Court's failure to provide an adequate remedy for taxes assessed in violation of federal law also conflicts with the Due Process Clause and this Court's precedents giving effect to that provision. "Be-

cause exaction of a tax constitutes a deprivation of property," this Court has held that "the State must provide procedural safeguards against unlawful exactions in order to satisfy the command of the Due Process Clause." *McKesson Corp.* v. *Florida Alcohol & Tobacco Div.*, 496 U.S. 18, 36 (1990). Accordingly, in a refund action

> the State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy' for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one.

Id. at 39 (footnote and internal citation omitted). A State can "provide that remedy before the disputed taxes are paid (predeprivation), after they are paid (postdeprivation), or both." *Reich* v. *Collins*, 115 S. Ct. 547, 549 (1994). A State providing postdeprivation review, however, must "provide meaningful backward-looking relief." *McKesson*, 496 U.S. at 31.

Utah Code Section 59-2-1321 provides a postdeprivation remedy for "taxes . . . erroneously or illegally collected." As interpreted by the Utah courts below, however, the remedy is meaningless and, therefore, violates due process, because, in the language of this Court in *McKesson*, it does not provide "meaningful backward-looking relief." The district court essentially conceded as much, holding that Section 59-2-1321 did not provide the " 'look backward" relief" petitioner sought. App. 11a. The Utah Supreme Court agreed. App. 6a. However, "look backward" relief is precisely what the Constitution requires. See *McKesson*, 496 U.S. at 31.

Furthermore, this Court has forbidden States providing "clear and certain" postdeprivation relief from modifying their refund provisions in "midcourse." *Reich*, 115 S. Ct. at 550. In *Reich*, Georgia had assessed federal retirement benefits contrary to federal law and a taxpayer sought a refund under a State statute remarkably similar to Utah's.

Georgia Code Ann. § 48-2-35(a) provided that "[a] taxpayer shall be refunded any and all taxes . . . determined to have been erroneously or illegally assessed." Georgia's Supreme Court, however, limited the application of the refund statute to taxes assessed under statutes that are not themselves unconstitutional or invalid. *Reich*, 115 S. Ct. at 549. The Georgia Supreme Court, like the court below, ignored an intervening decision from this Court and insisted on upholding its treatment of the taxpayer. *Id.* at 550.

This Court reversed the Georgia Supreme Court, holding that the State could not modify its postdeprivation remedy in midcourse by judicial construction. *Id.* The Court held that the State had held out to its taxpayers a postdeprivation remedy. *Id.* The average taxpayer reading the Georgia statute would have thought it "obvious that state taxes assessed in violation of federal law [we]re 'illegally assessed' taxes," and the Georgia court had put no limiting construction on the "sweeping language" of the statute prior to that time. *Id.* Secondly, the Court held that the taxpayer need not have known about the unlawfulness of the assessment at the time the tax was paid because the statute did not contain a "contemporaneous protest requirement." *Id.* at 551.

The decision of the Utah Supreme Court in this case conflicts with this Court's decision in *Reich*, notwithstanding its claim that the case is distinguishable. App. 7a n.2. Utah Code Section 59-2-1321 provides "sweeping language" authorizing postdeprivation relief essentially identical to the Georgia statute in *Reich*. Moreover, the Utah Supreme Court conceded that it "ha[d] not previously placed a limiting construction on section 59-2-1321." *Id.* Finally, the court's repeated explications concerning what State officials and petitioner knew at the time the *ad valorem* taxes were assessed are irrelevant because the Utah refund provision has no contemporaneous protest requirement. Therefore, the Utah Supreme Court's decision finding no due process violation in the

State's postdeprivation remedy squarely conflicts with this Court's decision in *Reich*, and, more fundamentally, leaves Utah without a "clear and certain" remedy for erroneous and illegal tax assessments in violation of the Due Process Clause. Accordingly, this Court should review the decision of the court below.

* * * *

In sum, the decision of the court below conflicts with this Court's precedents construing the Due Process Clause requirement of a "clear and certain" remedy for taxes assessed in manifest violation of federal law and the Supremacy Clause. Only this Court can prevent individual States from collaterally, but no less deleteriously, interfering with federal regulation of national energy resources. Accordingly, this Court should review this case in order to balance properly the important federal and State interests implicated by the taxing consequences that flow from FERC rate decisions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 12, 1995

APPENDICES

APPENDIX A

SUPREME COURT OF UTAH
STATE OF UTAH
SALT LAKE CITY, UTAH

June 14, 1995

OFFICE OF THE CLERK

No. 940172
910800160

CIG EXPLORATION, INC.,
Plaintiff and Appellant,

v.

UTAH STATE TAX COMMISSION, UNITAH COUNTY, GLEN MCKEE, LORRIN MERRELL, MAX ADAMS, UNITAH COUNTY COMMISSIONERS, and DONNA RICHENS, Unitah County Treasurer,
Defendants and Appellees.

The petition for rehearing is denied. Enclosed is a copy of the amended opinion that was issued in this matter.

GEOFFREY J. BUTLER
Clerk

APPENDIX B

[Filed June 14, 1995]

IN THE SUPREME COURT
OF THE STATE OF UTAH

No. 940172

CIG EXPLORATION, INC.,
Plaintiff and Appellant,

v.

UTAH STATE TAX COMMISSION; UINTAH COUNTY; GLEN MCKEE, LORRIN MERRELL, and MAX ADAMS, Uintah County Commissioners; and DONNA RICHENS, Uintah County Treasurer,
Defendants and Appellees.

Eighth District, Uintah County
The Honorable John R. Anderson

AMENDED OPINION

ZIMMERMAN, Chief Justice:

CIG Exploration, Inc. ("Exploration"), appeals from the district court's grant of summary judgment, dismissing Exploration's claim for a refund of allegedly overpaid ad valorem taxes for the years 1981 through 1986. Before the district court, Exploration argued that it was entitled to a refund of taxes paid on the basis of valuations of its

natural gas wells in Uintah County which, though correct as of January 1st of each relevant year, would have been lower under a subsequent state of affairs. The district court concluded that (i) Exploration's claim was barred by the statute of limitations, and (ii) even if Exploration's claim was not time-barred, Exploration was not entitled to a refund because the alleged valuation error could not have been discovered until after the taxes were collected. We affirm.

The material facts in this case are not disputed. Exploration is a subsidiary of Colorado Interstate Gas Company ("CIG"), an interstate gas pipeline. In 1973, Exploration, CIG, and CIG's customers entered into a stipulation and agreement ("the stipulation") which, among other things, set forth a formula for calculating the price at which Exploration would provide natural gas services. In 1982, the Public Service Company of Colorado ("PSC"), a CIG customer and a party to the stipulation, filed a claim with the Federal Energy Regulatory Commission ("FERC"), asserting that Exploration had overcharged its customers for natural gas services in violation of the stipulation's pricing terms. After six years of litigation, FERC sustained PSC's allegations and ordered Exploration to refund approximately $89,000,000 to its customers.

From 1981 to 1986, Exploration owned and paid property taxes on natural gas wells located in Uintah County, Utah. The taxable value of these wells was fixed each year by the Utah State Tax Commission ("Commission") in accordance with the Commission's rule R884-10P-1(B)(4). That rule provided, "The taxable value of the underground gas rights shall be 400 percent of the proceeds from the sale of gas production from each such property during the calendar year prior to the date of assessment . . . ."

In 1989, shortly after FERC determined that Exploration had charged more for gas produced from, inter alia,

the Uintah County wells than it was entitled to charge under the stipulation, Exploration submitted a request to the Uintah County Commission for a refund of approximately $1,450,000 in ad valorem taxes paid on its wells from 1981 to 1986. In its request for a tax refund, Exploration claimed that the FERC order directing Exploration to return a portion of its gas-sale proceeds effectively reduced Exploration's net revenues from the Uintah County wells for each of the years 1980 through 1985. Because the Commission's valuations of the Uintah County property for the years 1981 through 1986 were based upon what turned out to be an inaccurate measure of Exploration's gas-sale proceeds from these wells, Exploration claimed that it was "entitled to a refund or a recoupment of ad valorem taxes paid."

On July 5, 1991, after the County had denied Exploration's request for a tax refund, Exploration filed this action in district court, seeking recovery of the allegedly overpaid ad valorem taxes. Exploration grounded its complaint on section 59-2-1321 of the Code, which entitles taxpayers to a refund of taxes which have been "erroneously or illegally collected." Utah Code Ann. § 59-2-1321. The district court granted summary judgment against Exploration, concluding that (i) Exploration's claim was barred by either of the potentially relevant statutes of limitations, Utah Code Ann. § 78-12-26(3), (4); and (ii) even if Exploration's claim was not time-barred, Exploration could not recover under section 59-2-1321 that section "is concerned with cases in illegal assessment or collection involving factors where the error could objectively be determined at the time of the [assessment or collection]." Exploration appeals, challenging the district court's legal conclusions.

We first state the applicable standard of review. Summary judgment is appropriate only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P.

56(c); *Higgins v. Salt Lake County*, 855 P.2d 231, 235 (Utah 1993). "When there are no disputed issues of material fact, a challenge to summary judgment presents only a question of law, which we review for correctness." *West v. Thomson Newspapers*, 872 P.2d 999, 1004 (Utah 1994) (citations omitted); *accord Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 920 (Utah 1993).

Because we find the issue dispositive, we address only the question of whether section 59-2-1321 provides a vehicle by which Exploration can recover its allegedly overpaid ad valorem taxes. Section 59-2-1321 provides in relevant part, "Any taxes . . . erroneously or illegally collected, may, by order of the county legislative body, be refunded by the county treasurer." Utah Code Ann. § 59-2-1321. We have held that this language mandates that counties refund erroneously or illegally collected ad valorem taxes. *Utah Parks Co. v. Iron County*, 380 P.2d 924, 926 (Utah 1963) (citing *Neilson v. San Pete County*, 133 P. 334 (Utah 1912)).[1] Therefore, the determinative issue in this case is whether the taxes of which Exploration seeks a refund were erroneously or illegally collected within the meaning of section 59-2-1321. We conclude that they were not.

Initially, we must determine what constitutes erroneously or illegally collected taxes. When faced with a quesiton of statutory construction, we look first to the plain language of the statute. *State v. Larsen*, 865 P.2d 1356, 1357 (Utah 1993); *Schurtz v. BMW of N. Am., Inc.*, 814 P.2d 1108, 1112 (Utah 1991). Only if we find some ambiguity need we look further. *Shurtz*, 814 P.2d at 1112; *accord World Peace Movement of Am. v. Newspaper Agency Corp.*, 879 P.2d 253, 259 (Utah 1994)

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[1] Although both *Utah Parks Co. v. Iron County*, 380 P.2d 924 (Utah 1963), and *Neilson v. San Pete County*, 123 P. 334 (Utah 1912), relied on the predecessor to section 59-2-1321, the statutory language at issue in this case has not changed in any material respect since Utah Parks and Neilson were decided.

("Only when we find ambiguity in the statute's plain language need we seek guidance from the legislative history and relevant policy considerations."); *see also Beynon v. St. George-Dixie Lodge # 1743, Benevolent & Protective Order of Elks*, 854 P.2d 513, 518 (Utah 1993) ("If doubt or uncertainty exists as to the meaning or application of an act's provisions, the court should analyze the act in its entirety and 'harmonize its provisions in accordance with the legislative intent and purpose.'" (quoting *Osuala v. Aetna Life & Casualty*, 608 P.2d 242, 243 (Utah 1980))). Applying these principles, the district court concluded that the term "erroneously or illegally collected" does not include ad valorem taxes paid on the basis of a valuation which was correct as of the time it was made but which is later alleged to have been erroneous due to factors not existing at the time of the valuation. We agree.

The Code does not define the term "erroneously or illegally collected." We therefore consider the term in light of the entire Property Tax Act, Utah Code Ann. §§ 59-2-101 to -1372. The statutory scheme of property assessment revolves around January 1st of each year, the valuation date. Specifically, section 59-2-201(1), under which the Uintah County property in question was assessed, provides in relevant part:

> (1) By May 1 of each year the following property shall be assessed by the commission at 100% of fair market value, *as valued on January 1*, in accordance with this chapter:
>
> . . . ;
>
> (e) all mines and mining claims . . . .

Utah Code Ann. § 59-2-201(1) (emphasis added). The Property Tax Act's definition of "mine" encompasses the Uintah County property. *See* Utah Code Ann. § 59-2-102(14), (16). We think that under the plain import of this language, the determinative question is the value

as of January 1st, *viewed retrospectively*. This leaves no room for us to hold that a taxpayer is entitled to a refund of taxes which were paid on the basis of a valuation that was correct as of a given January 1st but which would have been different had the assessor known of a subsequent state of facts.

Our conclusion that Exploration is not entitled to a refund under section 59-2-1321 as a result of the FERC order is supported by our decision in *Shea v. State Tax Commission*, 120 P.2d 274 (Utah 1941). In that case, the plaintiff sought to recover diesel fuel taxes paid without protest pursuant to a statute later held to be unconstitutional. The plaintiff argued that he was entitled to a refund under a statute providing that "[w]henever the [state tax commission] through error collects any fee not required to be paid hereunder the same shall be refunded to the person paying the same." Act of March 10, 1937, ch. 65, § 149, 1937 Utah Laws 138. Rejecting the plaintiff's contention that any collection under a statute later declared unconstitutional is a collection "through error," we interpreted the statute authorizing a refund as applying only "to collections, which the officials could themselves have determined at the time of collection that they should not collect." *Shea*, 120 P.2d at 276. Under *Shea*, as under our decision today, events occurring subsequent to the collection of the tax did not render the collection erroneous, entitling the taxpayer to a refund.[2]

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[2] Our analysis is not affected by the United States Supreme Court's recent decision in *Reich v. Collins*, 115 S. Ct. 547 (1994). Reich, a Georgia taxpayer, sought a refund of state income taxes paid on federal retirement benefits. Georgia's refund statute reads in pertinent part, "A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him." *Id.* at 549. Reich argued that the taxes at issue had been "erroneously or illegally assessed and collected" because the law under which the taxes were assessed and collected was subsequently declared unconstitutional. The Supreme Court ordered a refund, holding that Georgia violated the Due Process Clause of the Fourteenth Amendment by "[hold-

For the foregoing reasons, we hold that the taxes of which Exploration seeks a refund were not "erroneously or illegally collected" within the meaning of section 59-2-1321. Accordingly, we affirm.

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ing] out what plainly appeared to be a 'clear and certain' post-deprivation remedy, in the form of its tax refund statute, and then declar[ing], only after Reich and others had paid the disputed taxes, that no such remedy exists." *Id.* at 550. In reaching this conclusion, the Supreme Court found two factors significant: (i) "[T]he average taxpayer reading this language [Georgia's refund statute] would think it obvious that state taxes assessed in violation of federal law are 'illegally assessed' taxes"; and (ii) the Georgia Supreme Court has not placed "any limiting construction on the statute's sweeping language." *Id.* The Court also noted that the Eleventh Circuit Court of Appeals had previously denied federal court relief to taxpayers raising claims similar to Reich's, in part because it thought Georgia's refund statute applied to the claims. *Id.* (citing *Waldron v. Collins*, 788 F.2d 736, 738, *cert. denied*, 479 U.S. 884 (1986)).

The instant case is distinguishable from *Reich*. First, as we stated above, a plain reading of the Property Tax Act makes clear that taxes paid on the basis of a valuation that was correct as of January 1st are not "illegally or erroneously collected." Therefore, the "average taxpayer" reading section 59-2-1321 in conjunction with the rest of the Property Tax Act would not conclude that CIG is entitled to a refund. Second, although we have not previously placed a limiting construction on section 59-2-1321, this court held long ago that events occurring subsequent to the collection of a tax do not render the collection erroneous. *See Shea v. State Tax Comm'n*, 120 P.2d 274, 276 (Utah 1941). Therefore, Utah has not "held out what plainly appeared to be a 'clear and certain' postdeprivation remedy" that would have entitled CIG to a refund. *Reich*, —— U.S. at ——, 115 S.Ct. at 550. Accordingly, we conclude that CIG's due process rights have not been violated in this case.

WE CONCUR:

RICHARD C. HOWE
Justice

CHRISTINE M. DURHAM
Justice

LEONARD H. RUSSON
Justice

J. DENNIS FREDERICK
District Judge

Stewart, Associate Chief Justice, having disqualified himself, does not participate herein; Frederick, District Judge, sat.

APPENDIX C

EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR UINTAH COUNTY, STATE OF UTAH
VERNAL DEPARTMENT

Case No. 910800160

CIG EXPLORATION, INC.,

Plaintiff,

VS.

UTAH STATE TAX COMMISSION, UINTAH COUNTY, GLEN MCKEE, LORRIN MERRELL, MAX ADAMS, UINTAH COUNTY COMMISSIONERS, and DONNA RICHENS, Uintah County Treasurer,

Defendant.

DECISION AND ORDER

This matter was before the Court on Plaintiff's Motion for Partial Summary Judgment and on Defendant's Motion for Summary Judgment. Argument on the Motions was held on February 22, 1994. Plaintiff, CIG Exploration, Inc., was represented by Maxwell A. Miller and Debra K. Broussard. The Uintah County Defendants were represented by JoAnn B. Stringham and Bill Thomas Peters. The Utah State Tax Commission was represented by Kelly Wright.

Prior to the hearing, the Court considered the Memoranda and exhibits filed by the parties. The Court heard arguments and took the matter under advisement. The Court has considered the law and facts relating to the Motions for Summary Judgment. Now being fully advised, the Court renders the following Decision and Order.

The undisputed facts are set forth in the initial Memoranda of the parties and the parties are in agreement that there are no material issues of fact before the Court which would preclude the Court's considering the matters raised on Summary Judgment.

It is conceded by the parties that the Plaintiff was aware that its tight sands pricing policy may have been erroneous as early as 1982.

This Court has previously ruled that the Defendants could raise the issue of latches and statute of limitations bar by allowing amendments to their pleadings and the Court has considered those arguments as raised. This Court rejects the argument of Plaintiff that there is simply no statute of limitations. The Court concludes that whether U.C.A. Section 78-12-26(3) or (4) is the applicable statute of limitations Plaintiff's claims are time barred. Because the CIG Exploration Plaintiff was on notice as early as 1982 that prices charged may have been erroneous, they could have taken action under the Utah Tax Statutes to cover or protect itself for each of the years in question. It cannot be argued that this was not also the discovery date under the "mistake or fraud" statute. This Court holds that the Statute began to run for each of the years in question as early as 1982 but at the very least at the latest tax year of 1986. Therefore, because CIG Exploration did not file this action until 1991, more than four years after the last tax payment, CIG Exploration's claims are barred by the Statute of Limitations.

Even if Plaintiff's claim was not barred by the appropriate Statute of Limitations, this Court is of the opinion that U.C.A. Section 59-2-1321, as it has been construed by the Utah Supreme Court, would not provide the "look backward" relief that Plaintiff urges.

This Court is of the opinion that U.C.A. Section 59-2-1321 can't be construed to apply where the issue is

valuation. Plaintiff cites *Utah Parks* and *Atlantic Richfield, infra,* cases as authority for the Court's assumption of jurisdiction to determine tax payer relief where a tax has been erroneously or illegally collected. This Court agrees, but limits the holding of those cases to just such instances. This Court is of the opinion that to allow a backward look at valuation errors would open a myriad of problems with which the Tax Commission nor the Court system could deal. Utah Code Annotated Section 59-2-1321 is concerned with cases in illegal assessment or collection involving factors where the error could objectively be determined at the time of the event. Under a plain reading of the statute and as interpreted by *Shea vs. State Tax Commission,* 120 P2d 274, 275 (Utah, 1941), the vehicle for relief has to be based on objective factors that could have been determined at the time of the event and clearly not with subsequent factors which may or may not affect value.

Atlantic Richfield Company vs. Board of County Commissioners, 569 P2d 1267 (WY, 1977) had to do with the determination of properties which by their nature were later determined to be exempt. It had nothing to do with the subjective concept of value. *Utah Parks Company vs. Iron County,* 14 Utah 2d 178, 380 P2d 924 (1963) dealt with the same concept. This Court believes that the *Utah Parks* case stands for the proposition that the Statute providing the relief does grant the Court jurisdiction to correct a mistake or an illegal tax where the illegality or incorrect assessment could be determined at the time of the event. Since the statutory scheme in Utah provides for administrative remedies where there is a problem with valuations, this Court cannot interpret U.C.A. Section 59-2-1321 to vest this Court with jurisdiction to provide relief where there has been in fact a misdetermination of value.

Based upon the above and foregoing conclusions and analysis, it is the opinion of this Court that the Defend-

ants' Motion for Summary Judgment should be granted and Plaintiff's claim should be and is dismissed.

Counsel for the Defendants are directed to prepare Judgment of Dismissal.

DATED this 28 day of February, 1994.

BY THE COURT:

/s/ John R. Anderson
JOHN R. ANDERSON
District Court Judge

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners:

Martha O. Hesse, Chairman;
Charles G. Stalon, Charles A. Trabandt,
Elizabeth Anne Moler and Jerry J. Langdon.

Docket No. CP73-184-005

COLORADO INTERSTATE GAS COMPANY, a Division of Colorado Interstate Company

Docket No. CI73-485-004

CIG EXPLORATION, INC.

ORDER APPROVING SETTLEMENT WITH MODIFICATIONS

(Issued August 1, 1989)

On March 13, 1989, Colorado Interstate Gas Company (CIG), CIG Exploration, Inc. (CIGE), Public Service Company of Colorado, Western Gas Supply Company, and Cheyenne Light, Fuel and Power Company (Public Service), the Public Utility Commission of the State of Colorado, The City and County and Denver, and The City of Colorado Springs filed an offer of settlement in these proceedings.

On April 3, 1989, initial comments in support of the settlement were filed by the parties which filed the offer of settlement. Comments were also filed by the Commission Staff (Staff) which did not oppose the settlement but expressed certain concerns, and Natural Gas Pipeline Company of America (Natural) which urged the approval of the settlement with a proposed modification. On April 13, 1989, CIG, CIGE, and Public Service filed joint reply comments and Natural filed reply comments.

For the reasons discussed below, the offer of settlement as modified herein is found to be in the public interest and is approved.

BACKGROUND

On January 7, 1974, the Commission approved a settlement agreement filed in 1973 which authorized CIG and its affiliate CIGE to establish a Gas Search Program.[1] The 1973 settlement required $50.9 million to be spent for this exploration and development program. The funding for the program was to come from higher applicable area rates rather than cost of service rates for CIG's company owned production from existing leases which were transferred to CIGE.

On March 30, 1984, the Commission established a hearing following an offer of settlement filed on March 11, 1983 regarding the final accounting of the Gas Search Program Fund (Program Fund).[2] Among the issues set for hearing were whether the 1973 settlement authorized CIG to pay Natural Gas Policy Act of 1978 (NGPA) maximum lawful prices for "new gas" developed under the program and whether CIG's final accounting and report filed August 25, 1981, was incorrect.

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[1] *Colorado Interstate Gas Co.*, 51 FPC 74 (1974).

[2] 26 FERC ¶ 61,422.

Following an evidentiary hearing an initial decision was issued on July 24, 1985.[3] In Opinion Nos. 306[4] and 306-A[5], the Commission affirmed in part and reversed in part the initial decision. The Commission found, *inter alia*, that the 1973 settlement permitted the collection of certain NGPA incentive prices for "new gas" but not tight sands pricing under section 107(c)(5) and provided a fixed rate of escalation for price deregulated section 107(c)(1) deep gas. Further, the Commission found that undeveloped leases acquired with program funds when transferred to a non-fund account at the end of the program should have been valued at their fair market value rather than book value. CIG was required to refund the amounts collected in excess of that allowed by 1973 settlement with interest.

The Offer of Settlement

The terms of offer of settlement are summarized as follows:

1. Within 10 days of a final Commission order no longer subject to appeal approving the settlement, CIG will refund $44,500,000 to its jurisdictional sales customers based on sales volumes for the period November 1, 1979 to December 31, 1988.

2. CIG will refund an additional $44,500,000 to its jurisdictional sales customers by reducing the non-gas portion of its commodity rates by 28.7 cents per Kcf.

3. CIG will file certain *pro forma* tariff sheets with the Commission after a final Commission order approving the settlement which is no longer subject to appeal. The offer of settle-

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[3] 32 FERC ¶ 63,033 (1985).

[4] 44 FERC ¶ 61,022 (1988).

[5] 45 FERC ¶ 61,293 (1988).

ment states that such tariff sheets are anticipated to be in effect for approximately 24 months until the additional $44,500,000 has been refunded. Any then-remaining balance would be reflected in Account No. 191.

4. If the initial refunds have not been made and the tariff sheets have not become effective on or before October 1, 1989, because the Commission's approval has not become final and has been appealed or is subject to appeal, CIG, at its option, shall either make the refunds or pay interest at the Commission approved interest rate, commencing on October 1, 1989.

5. If the initial refunds have not been made and the tariff sheets have not been made effective on or before October 1, 1989, because Commission approval has not become final, CIG will keep its customers whole with respect to the refunds and enter into negotiations and proceed with diligence to amend the settlement.

6. CIG will be permitted to pay and collect from its customers prices for Program Fund gas up to the maximum lawful prices established in Opinion Nos. 306 and 306-A.

7. The amounts to be refunded will be treated as a below-the-line expense in determining CIG's future costs of service.

8. The refund provided for in this settlement includes, at a minimum, the entire principal amount of refunds required by Opinion Nos. 306 and 306-A attributable to prices paid by CIG for NGPA section 107 "deep" and "tight sands" gas (excess payments).

9. CIG, CIGE, or both, have the right to seek recovery of and retain third party excess pay-

ments and related costs from the recipients of those payments and are not required to pass those payments through to their customers.

10. After the Commission's approval of this settlement becomes final and is no longer subject to appeal, the parties agree to release and discharge each other from claims and causes of action arising out of the 1973 settlement or the Program Fund.

11. The settlement shall be effective as of the date of Commission approval, without any condition unacceptable to the parties as defined in the settlement, becomes final and no longer subject to appeal. After such Commission approval, all parties will file appropriate pleadings withdrawing appeals of Opinion Nos. 306 and 306-A and a motion and proposed order of dismissal will be filed in Case No. 82 CV 10220 before the District Court in and for the City and County of Denver.

Comments on the Offer of Settlement

Staff notes that Commission approval of the settlement will produce immediate benefits for CIG's customers and that the negotiated refund amount of $89 million appears reasonable. Staff, while not opposing the settlement, expresses concerns. Staff asserts that pursuant to Order No. 483, III FERC Stats. and Regs. ¶ 30,778 at 30,870, as codified in section 154.305 of the Commission's regulations,[6] a pipeline is required to maintain refunds separately in a subaccount of Account No. 191 to be disbursed in cases where the refund balances reach the lesser of one cent per KMBtu of the most recent 12 months of a pipeline's sales or $2 million, in order to reduce deferred account balances and minimize the distortion of

[6] 18 C.F.R. § 154.305 (1988).

current cost signals caused by the amortization of prior period costs by a surcharge. Staff takes the position that the 28.7 cents per Kcf credit is a refund of excess purchased gas costs which requires a waiver of the Commission's regulations.

Staff asserts that in *Tennessee Gas Pipeline Company*, 33 FERC ¶ 61,006 at 61,013 (1983) (*Tennessee*), the Commission rejected a proposed settlement which permitted the pipeline to lower the present PGA gas cost portion of its rates by including in its Account No. 191 surcharge refunds resulting from reductions in non gas costs. Staff concludes that CIG's proposal amounts to using the settlement as a marketing tool contrary to Commission policy. Staff submits that one option available to the Commission is to modify the settlement to require an $89 million cash refund and that CIG could be given the option to make lump sum cash refunds for once a year for the two year period with interest, if it would alleviate a cash flow problem. Staff also asserts that CIG's proposal to defer implementation of the settlement until after a final, non-appealable Commission order is not consistent with the Commission practice of requiring settlements to become effective following a final Commission order on rehearing.

In its initial comments, Natural urges the Commission to approve the offer of settlement, modified in accordance with its suggestions, so that CIG's customers can receive the substantial refunds as soon as possible. Natural asserts that CIG's proposed 18.7¢ per Kcf reduction will provide CIG with a substantial edge in competing for gas sales and ignores the Commission's policy of requiring prompt cash refunds to minimize the distortion of current cost signals, citing Order No. 483, FERC Stats. and Regs. ¶ 30,778 at 30,879. Natural further asserts that the requirement to purchase gas to obtain refunds may result in some customers receiving substantially more in refunds and credits than their overpayment

and that even a new sales customer would benefit from the proposal. Natural submits that CIG's proposal is an effort to insulate itself from competition and should be rejected.

Natural contends that the proposed rate reduction will provide no benefit to CIG's customers, such as Natural, who will not renew their service agreements which expire September 30, 1989, or who elect to use CIG as a transporter. Natural further contends that while it made substantial contributions to the gas search program it and similarly situated customers will receive only half of the refund to which it is entitled and that such result is particularly inappropriate when CIG is proposing a take-or-pay recovery mechanism in Docket No. RP89-98 which will require customers whose service agreements expire this year to continue to pay CIG's buyout-buydown costs. Natural proposes that CIG be required to pay to customers an allocated share of the proposed $44.5 million rate reduction based sales volumes for the period November 1, 1979 - December 31, 1988, within 10 days of the expiration of any service agreement reduced by 28.7¢ for each Kcf purchased by each customer at the reduced rate.

In their joint reply comments, CIG, CIGE, and Public Service submit that the proposed settlement is a reasonable resolution of all the issues in this lengthy proceeding and was filed by all active parties to these proceedings and all signatories to the 1973 settlement. CIG, CIGE, and Public Service argue that providing a $44.5 million refund through a rate reduction is an essential aspect of the total settlement package. CIG, CIGE, and Public Service further argue that the reduction is not an improper use of the PGA as a marketing tool since only the non-gas component of CIG's commodity rate will be reduced as a below the line expense. CIG, CIGE, and Public Service contend that Natural should not be permitted to use the expiration of its service agreement to enhance its position.

CIG, CIGE, and Public Service argue that the settlement provision which provides the settlement shall become effective after a final, non-appealable Commission order should not be modified. CIG, CIGE, and Public Service state that there are a number of cases where the Commission has approved settlements containing such language.

In its reply comments, Natural states that it supports full cash refunds and that Staff's suggestion of lump sum refunds with interest over a two-year period is acceptable, if modified to specifically state that expiration of a service agreement or a customer's conversion from sales to transportation does not affect the customer's entitlement to full refunds. Natural also states that it supports Staff's position that the settlement be effective on denial of any petition for rehearing. Natural submits that any waiver of Commission regulations be conditioned to require CIG to make full refunds to any customer whose service agreement expires within 10 days of the expiration to allow customers an option to obtain either a reduced commodity rate or an immediate cash refund.

DISCUSSION

After consideration of the proposed settlement and all comments submitted in these proceedings, the Commission adopts the staff's suggested modification requiring a cash refund of the entire $89 million refund amount. The total amount will be refunded to CIG's jurisdictional sales customers based on the sales volumes for the period November 1, 1979 to December 1, 1988, in lieu of the $44.5 million refund through a reduction of 28.7 cents in the non-gas portion of CIG's commodity rates as set forth in Paragraph 2 of the settlement. However, the $89 million cash refund may be made in four equal annual payments with interest calculated in accordance with section 154.67(c) of the Commission's regulations from the date of this order. The initial payment shall be made

at the same time as provided for the proposed $44.5 million cash refund in Paragraph 1 of the settlement with succeeding annual payments on that same date thereafter. The expiration of a service agreement or a customer's conversion from sales to transportation will not affect the customer's entitlement to its share of the refund. The Commission believes that it is appropriate to refund these amounts to these customers rather than adopt CIG's proposed rate reduction. The Commission finds that the settlement as modified is fair and reasonable and in the public interest.

Finally, Staff suggests that a delay in effectiveness of the settlement until a final non-appealable order is inconsistent with current Commission policy. However, in this case, CIG is required to pay interest from the date of this order under the settlement as modified by this order. Thus, there is no need to adopt that proposed modification.

The Commission orders:

(A) The offer of settlement filed on March 13, 1989, in these proceedings is approved as modified by this order.

(B) The Commission's approval of this settlement as modified by this order does not constitute approval of, or precedent regarding, any principle or issues in these proceedings.

(C) Within 30 days from the date of any subject refund payment, CIG must file a refund report. The report must show (1) the amount of principal and interest paid, (2) the dates the refunds were paid, and (3) a statement of concurrence by the purchaser(s).

By the Commission.

/s/ Lois D. Cashell
LOIS D. CASHELL,
Secretary.

(SEAL)

APPENDIX E

BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

STIPULATION AND AGREEMENT

THIS STIPULATION AND AGREEMENT is made this 23rd day of February, 1989, between COLORADO INTERSTATE GAS COMPANY and its subsidiary, CIG EXPLORATION, INC. ("CIGE"), hereinafter referred to collectively (unless the context otherwise indicates) as "CIG", PUBLIC SERVICE COMPANY OF COLORADO ("PSCO"), WESTERN GAS SUPPLY COMPANY, CHEYENNE LIGHT, FUEL & POWER COMPANY, hereinafter referred to collectively as "PSCO Group," THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, THE CITY AND COUNTY OF DENVER and THE CITY OF COLORADO SPRINGS.

WITNESSETH:

WHEREAS, there recently was pending before the Federal Energy Regulatory Commission ("FERC" or "Commission") in Docket Nos. CP73-184-002 and CI73-485-002 certain matters concerning the pricing, operation and final accounting regarding the "Gas Search Program and Gas Search Program Fund" established under the 1973 Stipulation and Agreement of Settlement ("1973 Stipulation") approved by the Federal Power Commission in Docket Nos. CP73-184-002 and CI73-485-002; and

WHEREAS, an Initial Decision of the Administrative Law Judge dated July 24, 1985 (32 FERC ¶ 63,033), FERC Opinion No. 306 dated July 7, 1988 (44 FERC ¶ 61,023) and FERC Opinion No. 306-A dated Novem-

ber 28, 1988 (45 FERC ¶ 61,293) have been issued in said dockets after five days of hearings and the receipt of 130 exhibits therein; and

WHEREAS, said FERC decisions are ripe for appeal and appropriate pleadings seeking judicial review have been filed by all signatory parties to the 1973 Stipulation and the City of Colorado Springs (an intervenor in these proceedings); and

WHEREAS, all of the signatory parties to the 1973 Stipulation and the City of Colorado Springs have agreed to resolve all issues in these proceedings as herein set forth.

NOW, THEREFORE, for and in consideration of the promises, covenants and conditions hereinafter set forth, and intending to be legally bound hereby upon FERC approval of this Stipulation and Agreement ("1989 Stipulation"), without unacceptable condition, becoming final and no longer subject to appeal, CIG, the PSCO Group, the Public Utilities Commission of the State of Colorado, the City and County of Denver and the City of Colorado Springs agree as follows:

1. Within ten (10) days of FERC approval of this 1989 Stipulation, without unacceptable condition, becoming final and no longer subject to appeal, CIG shall refund to its jurisdictional sales customers the amount of forty-four million five hundred thousand dollars ($44,500,000). This refund shall be allocated among such customers based upon sales volumes for the period from November 1, 1979, to December 31, 1988, as shown on the attached Appendix "A."

2. CIG shall refund an additional forty-four million five hundred thousand dollars ($44,500,000) to its jurisdictional sales customers by reducing the non-gas cost portion of its commodity rates by the amount of twenty eight point seven cents (28.7¢) per Mcf. Attached as

Appendix "B" are *pro forma* tariff sheets reflecting implementation of such reduction. By the first day of the first month following the date FERC approval of this 1989 Stipulation, without unacceptable condition, becomes final and no longer subject to appeal, CIG shall file with the FERC tariff sheets in the form set forth in Appendix "B." Such tariff sheets shall be effective on the first day of the second month following the date upon which FERC approval of this 1989 Stipulation, without unacceptable condition, becomes final and no longer subject to appeal. Such tariff sheets are anticipated to be in effect for a period of approximately twenty-four (24) months thereafter. When CIG anticipates that said additional forty-four million five hundred thousand dollars ($44,500,000) will be totally refunded to CIG's jurisdictional sales customers, whether earlier or later than the twenty-four (24) month period, the tariff sheets shall expire, and the then-remaining balance, if any, shall be reflected in FERC Account 191. By this 1989 Stipulation CIG shall not be precluded from filing for any rate changes authorized by its tariffs, the Natural Gas Act, the Natural Gas Policy Act ("NGPA"), successor legislation to either such acts, or FERC regulations. The *pro forma* tariff sheets attached as Appendix "B" are filed subject to any changes in CIG's rates that may occur prior to the date that FERC approval of this 1989 Stipulation becomes final and no longer subject to appeal. The entire rate reduction provided in this paragraph will be achieved by deductions from the non-gas cost portion of CIG's commodity rates. Any reductions in or additions to gas purchase costs will be passed through the Purchase Gas Adjustment provisions of CIG's tariff ("PGA") to the customers of CIG in the normal manner, except as provided in Paragraph 6 below. Except as provided in Paragraph 6 below, this 1989 Stipulation is not an admission by CIG of any impropriety in the pricing, operation or final accounting regarding the Gas Search Program Fund or any other matter, but reflects instead a desire by all parties to settle the differences presently at issue between them.

3. The parties hereto agree to pursue final FERC approval of this 1989 Stipulation so that the rate refunds described in Paragraphs 1 and 2 above may, consistent with the other provisions of this 1989 Stipulation, be placed into effect no later than October 1, 1989. In the event the refunds described in Paragraph 1 have not been made and the tariff sheets described in Paragraph 2 have not become effective on or before October 1, 1989, and in the event this has occurred because FERC approval of this 1989 Stipulation, without unacceptable condition, has become final but has been appealed or is still subject to appeal as of October 1, 1989, then CIG, at its option, shall make said refunds or shall pay interest, at the FERC-approved interest rate, commencing October 1, 1989 through the date when the Paragraph 1 refunds are made and the Paragraph 2 tariff sheets have become effective.

In the event the refunds described in Paragraph 1 have not been made and the tariff sheets described in Paragraph 2 above have not become effective on or before October 1, 1989, and in the event this has occurred because FERC approval of this 1989 Stipulation, without unacceptable condition, has not become final as of October 1, 1989, then the parties hereto agree that CIG will keep its customers whole with respect to the refunds described in Paragraphs 1 and 2 for the period commencing October 1, 1989 through the date when the Paragraph 1 refunds are made and the Paragraph 2 tariff sheets have become effective, and shall enter into good faith negotiations and proceed with due diligence to amend this 1989 Stipulation to accomplish same.

4. CIG will be permitted to pay and collect from its customers prices for Gas Search Program Fund gas up to the maximum lawful prices set forth in FERC Opinion Nos. 306 and 306-A.

5. The amounts to be refunded pursuant to Paragraphs 1 and 2 above shall be treated as a below-the-line expense in determining CIG's future cost of service.

6. The parties hereto acknowledge and agree that the eighty-nine million dollar ($89,000,000) refund provided for in this 1989 Stipulation is the result of negotiations. Nevertheless, the parties hereto also recognize that this sum includes at a minimum the entire principal amount of refunds required by FERC Opinion Nos. 306 and 306-A attributable to prices paid by CIG for NGPA Section 107 "deep" and "tight sands" gas ("Excess Payments"), including Excess Payments made to producers other than CIGE ("Third Party Excess Payments"), as well as the principal amount of all taxes, royalties and other costs paid by CIG and/or CIGE related to Excess Payments ("Related Costs"). The parties further agree that CIG and/or CIGE has the right to seek recovery of and retain Third Party Excess Payments and Related Costs from those persons or entities in receipt of same. Accordingly, the parties hereto agree that in order to avoid the possibility of a duplicate refund by CIG to its customers due to the normal operation of CIG's PGA, or due to any other rule or regulation, notwithstanding any contrary tariff provision, rule or regulation, CIG and/or CIGE may retain (i.e., shall not be required to pass through to its customers) any Third Party Excess Payments and Related Costs (together with any interest recovered thereon) which CIG and/or CIGE may recover back from such persons or entities.

7. CIG will provide the other parties to this 1989 Stipulation with access to documentation sufficient to verify compliance by CIG and/or CIGE with the terms of this 1989 Stipulation.

8. Effective upon the tenth (10th) day following the date upon which FERC approval of this 1989 Stipulation, without unacceptable condition, becomes final and no longer subject to appeal, the parties hereto release and forever discharge each other and each party's successors and assigns (whether such party acquired its interests in any property subject to the Gas Search Program before

or after the effective date of this 1989 Stipulation) from any and all claims and causes of action known or unknown, discovered or undiscovered, fixed or contingent, which arise out of the 1973 Stipulation or the Gas Search Program Fund whether or not the same were raised or could have been raised in FERC Docket Nos. CP73-184-002 and CI73-485-002 or before the District Court in and for the City and County of Denver in Case No. 82 CV 10220. This includes but is not limited to the undeveloped lease valuation issue discussed at 32 FERC pp. 65,136-37 of the Initial Decision, but excludes claims and causes of action by CIG and/or CIGE for the recovery of Third Party Excess Payments and Related Costs as provided in Paragraph 6 above. Further, the parties hereto shall be deemed to have withdrawn any issues arising from or related to the Gas Search Program Fund from all CIG FERC proceedings in which they have been raised and no party shall raise directly or indirectly, any such issue in any future proceedings.

9. This 1989 Stipulation shall be effective as of the date FERC approval, without unacceptable condition, becomes final and no longer subject to appeal. If the FERC issues an order denying approval of this 1989 Stipulation, approves portions of this 1989 Stipulation and not others, or approves this 1989 Stipulation with conditions which approval, disapproval or conditions are unacceptable to any of the parties hereto, this 1989 Stipulation shall be null and void. Provided, however, that neither the previous sentence nor the other 'unacceptable condition' provisions of this 1989 Stipulation shall apply unless one or more of the parties hereto has provided written notice to all other parties hereto, within thirty (30) days of the date of FERC approval, that it believes such approval, disapproval or conditions are unacceptable. Within ten (10) days of FERC approval without unacceptable conditions of this 1989 Stipulation becoming final and no longer subject to appeal, all parties will file appropriate pleadings withdrawing appeals of Opinion

Nos. 306 and 306-A and the PSCO Group will file a Motion and proposed Order of Dismissal with Prejudice in its action against CIG and CIGE in Case No. 82 CV 10220.

10. The various provisions of this 1989 Stipulation are not severable and, unless this 1989 Stipulation is allowed to become effective by the FERC, it shall be privileged and not admissible in evidence or in any way described or discussed in any proceeding hereinafter.

11. Except as otherwise expressly provided for in this 1989 Stipulation, no party to these proceedings shall be deemed to have approved, accepted, agreed to, or consented to any legal or ratemaking principle, valuation methodology, or any allocation method or rate design formula underlying or supposed to underlie any of the rates provided herein. The parties also understand that the Commission's approval of this 1989 Stipulation will not constitute approval of, or precedent regarding, any principle or issue in Docket Nos. CP73-184-002 or CI 73-485-002.

12. Upon acceptance hereof by final order of the Commission, the proceedings at FERC Docket Nos. CP 73-184-002 and CI73-485-002 shall terminate.

13. In the event of an express conflict between the terms hereof and the terms of the 1973 Stipulation, the terms hereof shall control. In all other respects, the terms of the 1973 Stipulation shall remain in full force and effect.

14. The parties herein request that the Commission grant such waivers and special permissions with respect to the provisions of CIG's FERC Gas Tariff and the Commission's Regulations, to the extent necessary, to effectuate all the provisions hereof.

IN WITNESS WHEREOF, Colorado Interstate Gas Company, CIG Exploration, Inc., Public Service Company

of Colorado, Western Gas Supply Company, Cheyenne Light, Fuel & Power Company, the Public Utilities Commission of the State of Colorado, the City and County of Denver and the City of Colorado Springs have caused this 1989 Stipulation to be duly executed by its respective corporate officers, as of the date first above written.

ATTEST:

/s/ [Illegible]
Asst. Secretary

COLORADO INTERSTATE GAS COMPANY

/s/ [Illegible]
Name JON R. WHITNEY
Title Executive Vice President

ATTEST:

/s/ [Illegible]
Asst. Secretary

CIG EXPLORATION, INC.

/s/ [Illegible]
Name JON R. WHITNEY
Title Senior Vice President

ATTEST:

/s/ [Illegible]
Secretary

PUBLIC SERVICE COMPANY OF COLORADO

/s/ [Illegible]
Name A. E. MIDDENTS
Title Senior Vice President

ATTEST:

/s/ [Illegible]
Secretary

WESTERN GAS SUPPLY COMPANY

/s/ [Illegible]
Name A. E. MIDDENTS
Title President

ATTEST:

/s/ [Illegible]
Secretary

CHEYENNE LIGHT, FUEL & POWER COMPANY

/s/ [Illegible]
Name A. E. MIDDENTS
Title Vice President

ATTEST:

/s/ [Illegible]
Secretary

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

/s/ [Illegible]
Name ARNOLD H. COOK
Title Chairman

ATTEST:

By: /s/ [Illegible]
Deputy City Clerk

THE CITY AND COUNTY OF DENVER

/s/ [Illegible]
Name FEDERICO PEÑA
Title Mayor

ATTEST:

/s/ [Illegible]
Witness

THE CITY OF COLORADO SPRINGS

/s/ [Illegible]
Name HAROLD E. MISKEL
Title Acting Utilities Director

[City and County of Denver Seal]

[Originally Attached Appendices Omitted in Printing]

APPENDIX F

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners:

Martha O. Hesse, Chairman;

Charles G. Stalon, Charles A. Trabandt,
Elizabeth Anne Moler and Jerry J. Langdon.

Docket No. CP73-184-003

COLORADO INTERSTATE GAS COMPANY
a Division of Colorado Interstate Company

Docket No. CI73-485-002

CIG EXPLORATION, INC.

OPINION No. 306-A;
ORDER DENYING REHEARING

(Issued November 28, 1988)

I. Introduction

On July 7, 1988, the Federal Energy Regulatory Commission issued Opinion No. 306 [1] in these proceedings. That opinion and order affirmed in part and reversed in part the administrative law judge's initial decision [2] in-

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[1] 44 FERC ¶ 61,023 (1988).

[2] 32 FERC ¶ 63,033 (1985).

terpreting a 1973 settlement agreement which established a gas exploration program between Colorado Interstate Gas Company and its affiliates (referred to herein as CIG unless otherwise indicated) and CIG's customers.[3] Opinion No. 306 found, *inter alia*, that a pricing provision of that settlement, Article II, section 7, permitted the collection of certain incentive prices under the Natural Gas Policy Act of 1978 (NGPA) for "new" gas, i.e. reserves developed under the program,[4] but not the section 107 (c)(5) tight sands price, and provided for a fixed rate of escalation for section 107(c)(1) deep gas when it was price deregulated under the NGPA on November 1, 1979. Further, it was found that undeveloped leases acquired with program funds should have been valued at their fair market value rather than at book value when transferred back to a non-fund account at the end of the program. CIG was required to refund the amounts collected in excess of those allowed by the settlement with interest calculated pursuant to section 154.102(c) of the Commission's regulations.[5]

Timely requests for rehearing of Opinion No. 306 were filed by CIG and CIG Exploration, Inc. (referred to individually as CIGE), the Public Service Company of Colorado, Western Gas Supply Company, and Cheyenne Light, Fuel and Power Company (PSC), the City of

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[3] The 1973 settlement required $50.9 million to be spent for exploration and development. The funding for the program was to come from the receipt of higher applicable area rates rather than the cost of service rate for CIG's company-owned production from existing leases, which were transferred to CIG's production affiliate.

[4] The settlement refers to "old" gas as gas produced from the developed producing leases and related facilities transferred under the settlement.

[5] On August 8, 1988, the Commission issued an order extending the deadline for filing the required refund report and repayment plan to and including 45 days after a final Commission order on rehearing.

Colorado Springs (Colorado Springs)[6] and the Colorado Public Utilities Commission (CPUC).[7] On August 17, 1988, the City and County of Denver (Denver) filed an untimely request for rehearing. Denver states that it supports the arguments of PSC. The 30-day period within which to file for rehearing is established by section 19(a) of the Natural Gas Act and cannot be extended. Denver's filing will be treated as a motion for reconsideration. For the reasons discussed below, the requests for rehearing and reconsideration will be denied.

II. The Requests for Rehearing

A. PSC's Request

PSC argues in its request for rehearing that CIG failed to meet its burden of persuasion to show that NGPA prices were authorized by the 1973 settlement and that the Commission's order impermissibly relieved CIG of that burden and erroneously shifted the burden to PSC and other customers. PSC further argues that the Commission should not follow Opinion No. 77[8] because it has not been judicially approved. PSC states that in *Pennzoil v. FERC*[9] the court noted that Opinion No. 77 would be reconsidered and clarified in further proceedings[10] and asserts that the Commission has not done so.

PSC submits that Opinion No. 306 improperly relies upon *Pennzoil v. FERC (Pennzoil II)*[11] in support of the

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[6] Colorado Springs states in its request that it incorporates and supports the arguments of PSC.

[7] On September 2, 1988, the Commission denied CPUC's alternative request to file its untimely request for rehearing. CPUC states that if such request is denied it adopts the PSC request for rehearing.

[8] *Independent Oil & Gas Association*, 10 FERC ¶ 61,214 (1980).

[9] 645 F.2d 394 (5th Cir. 1981).

[10] *Id.* at 399.

[11] 789 F.2d 1128 (5th Cir. 1986).

validity of Opinion No. 77 in two-party protest cases. Further, PSC asserts that *Associated Gas Distributors v. FERC(AGD)*[12] did not affirm the Order No. 23 presumption as set forth in Opinion Nos. 77 and 135.[13] According to PSC, the summary application of the Opinion No. 77 criteria conflicts with the purpose of the Order No. 23 series [14] to determine the intent of the parties, since parties are not given a sufficient opportunity to present evidence, and the evidentiary burden is placed on the party opposing the rate increase. Assuming their validity, PSC argues that the Opinion No. 77 criteria should not have been applied in the instant proceeding because the circumstances and public interest implications involved in the Order 23 protest proceedings are different from those involved in a customer funded program to discover low-cost gas supplies. PSC asserts that the Commission itself implicitly recognized this distinction in the order setting this matter for rehearing by not indicating that the judge had discretion whether to hold a hearing and placing the burden of persuasion on CIG.[15] PSC further asserts that the Commission also acknowledged this distinction in Order No. 215-A.[16]

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[12] 810 F.2d 226 (D.C. Cir. 1987).

[13] *Transcontinental Gas Pipe Line Corporation*, 17 FERC ¶ 61,232 (1981).

[14] Final Regulations Amending and Clarifying Regulations Under the Natural Gas Policy Act and the Natural Gas Act, Order No. 23, *FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,040 (1979); Order on Rehearing of Order No. 23, Order No. 23-A, *FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,058 (1979); Order on Rehearing of Order No. 23-A, Order No. 23-B, *FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,065 (1979); Order on Rehearing of Order No. 23-B, *FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,073 (1979).

[15] 26 FERC ¶ 61,422 (1984).

[16] *Transcontinental Gas Pipe Line Corporation*, 28 FERC ¶ 61,018 (1984).

PSC contends that assuming *arguendo* their applicability and validity, the guidelines of Opinion No. 77 for finding that NGPA pricing has been precluded are met by the 1973 settlement. PSC further contends that the first criterion of Opinion No. 77, which requires a reference to rates established or prescribed by an administrative body, has been met because "area rate, or nationwide rate if such should be established" are in the conjunctive form in the settlement, and are both modified by the phrase, "from time to time established by the Commission." [17] PSC also argues that the second criterion of Opinion No. 77, requiring a coupling of the reference to administrative action with a reference to the Natural Gas Act, or the just and reasonable standard of that Act, is met by references in the settlement's pricing provision and preamble.

Finally, PSC asserts that the 1973 settlement and the regulatory and commercial context are unambiguous, and that the only reasonable conclusion is that CIGE was not authorized to charge NGPA prices.

B. CIG's Request for Rehearing

CIG argues that tight sands pricing under NGPA section 107(c)(5) is appropriate because the Commission's tight sands pricing regulations should not have been applied to the 1973 settlement, since such regulations apply only to "first sales," and the 1973 settlement is not a "first sale contract." CIG further argues that since the tight sands regulations do not apply to the 1973 settlement, absence of the negotiated contract price language in the settlement is irrelevant.[18]

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[17] Area rate was defined in Article II, section 2 of the settlement as "the applicable area rate, or nationwide rate if such should be established, from time to time established by the Commission."

[18] Part 271, Subpart G of the Commission's regulations allows the collection of an incentive price for tight sands gas only if the contract for its sale contains a "negotiated contract price" that establishes a fixed price in excess of the otherwise applicable ceil-

CIG asserts that the 1973 settlement authorized tight sands pricing since the Commission's general finding that there was contractual authority to pay NGPA incentive prices necessarily includes contractual authority to pay tight sands incentive prices. CIG further asserts that it was directed by the settlement to enter into gas purchase contracts "under terms and conditions reasonable and customary for gas purchase contracts with independent producers relating to reserves of comparable quality, nature and location," [19] and that the subject tight sands contracts met such requirement. CIG submits that the tight sands price is the "applicable area rate" respecting a specific designated tight sands formation or "area" and, in fact, that other incentive pricing mechanisms available in 1970's, including special relief, were available under the settlement. CIG argues that the collection of tight sands pricing is also consistent with the course of conduct of the parties to the settlement, because PSC was aware of the collection of tight sands prices but nevertheless delayed inordinately in contesting any aspect of CIG's NGPA pricing. CIG further argues that the 1973 settlement should be reformed in any case to include the required negotiated contract price language due to waiver, mutual mistake of fact, and/or detrimental reliance.

CIG submits that if tight sands pricing is not allowed, the Commission should permit withdrawal of the reserves associated with such gas from the program, consistent with Article II, section 8 of the settlement, which provides that at least 275 Bcf of gas reserves shall be dedicated "under contracts with pricing and other provisions comparable to those described in Section 7." CIG also submits that equity compels such withdrawal due to CIG's performance in meeting the settlement's minimum reserve commitment

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ing, or exceeds that ceiling by operation of a fixed escalator clause or by specifically referencing the Commission's incentive pricing authority under section 107 of the NGPA.

[19] Exh. 1A at 22-23.

and its reliance on the availability of tight sands pricing in developing the tight formation reserves.

CIG asserts that the Commission improperly applied *FERC v. Martin Exploration Management Co. (Martin Exploration)*[20] and Order No. 406[21] retroactively in concluding that the price of gas from its new deep gas wells was deregulated as of November 1, 1979, and that CIG had reasonably relied on the understanding that it could choose to price such gas under section 102 or 103 of the NGPA, rather than section 107(c)(1). CIG further asserts that it is inappropriate, inequitable, and contrary to the public interest to require refunds or interest respecting the deep gas and tight formation gas after January 1, 1985, since no violation of the NGPA maximum lawful price could have occurred after such gas was price deregulated, and there was an unreasonable delay by the parties in raising their complaints.

Finally, CIG argues that the undeveloped leases transferred by CIGE to a non-fund account at the end of the program were properly credited to the Program Fund at book value, since that was the amount paid for the leases, and such treatment is consistent with PSC's request that the Fund be credited for the "net book value" of certain vehicles and office equipment. Finally, CIG requests that the fair market valuation it offered be accepted.

III. Discussion

PSC's argument that the Commission improperly relieved CIG of its burden of persuasion and shifted the burden to CIG's customers is mistaken. The Commission order setting this matter for rehearing stated that "the standards and procedures established in the Order No. 23

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[20] 108 S. Ct. 1765 (1988).

[21] Deregulation and Other Pricing Changes on January 1, 1985, Under the Natural Gas Policy Act, *FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶ 30,614 (1984).

series and Opinion No. 77 which concern the construction of area rate clauses and whether they authorize NGPA rates, should be used to resolve this issue, to the extent applicable." [22] In Opinion No. 306, the Commission properly applied the Opinion No. 77 criteria. Since the evidence of parties' intent concerning NGPA pricing was inconclusive, the Commission determined the intent of the parties based on the text of the clause in dispute. The use of the general Opinion No. 77 factors did not improperly shift the burden of persuasion. All parties had an opportunity to make their case based on a preponderance of the evidence.

The Opinion No. 77 criteria themselves are meant to be general guidelines [23] and were applied in such manner in this case. There was no foregone conclusion that NGPA rates were applicable before the hearing process began, as alleged by CIG. The use of the Opinion No. 77 criteria did not categorically interpret the disputed clause without regard to extrinsic evidence. The Commission gave an opportunity to all parties to prove what they intended. After finding the evidence presented inconclusive, the Commission properly applied the Opinion No. 77 criteria. There was no improper shift of evidentiary burden to the parties opposing NGPA rates.

The Commission's order setting these proceedings for hearing did not conclude that Opinion No. 77 procedures were inapplicable. In fact, as previously noted, the Commission specifically stated that the standards and procedures set forth in the Order No. 23 series and Opinion No. 77 were to be used in these proceedings to resolve the issue of whether the area rate clause authorized NGPA rates "to the extent applicable." [24]

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[22] 26 FERC ¶ 61,422, at p. 61,946 (1984).

[23] *See* Opinion No. 77, 10 FERC at p. 61,398.

[24] Contrary to PSC's arguments, the Commission determination that a hearing was necessary and statements regarding burden of

The Opinion No. 77 criteria are valid and were properly applied in this case. Contrary to CIG's assertions, the Opinion No. 77 criteria have been reconsidered and clarified by later Commission decisions. In *AGD, supra,* the court recognized the validity of the Order No. 23 presumptions elaborated in Opinion No. 77 and Opinion No. 135, which reconsidered and restated the Opinion No. 77 formulation.

The Opinion No. 77 criteria are applicable to the 1973 settlement. There is no valid distinction on the basis that this is a "hybrid" protest case since several of the protestors are signatories to the contract. The court in *Pennzoil II* stated that in third-party protest cases, once the Order No. 23 presumption disappears, the central question for the Commission is the same as in the two-party situation where the parties to the disputed text disagree—the proper construction to give the contract.[25] Opinion No. 77 itself dealt with two settlement agreements approved in 1976, prior to the NGPA, which provided for price renegotiation in the event of deregulation. In this case, the subject pricing provisions are customary area rate clauses[26] with a "deregulation" clause specifying a fixed rate of escalation in price. There is no basis to distingiush use of the Opinion No. 77 criteria in the similar determination here of whether the area rate clause in the 1973 settlement agreement was intended to allow NGPA pricing for the subject sales of gas. There is no conflict between the public interest aspects of CIG's customer-funded program and the use of the Opinion No. 77

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persuasion in the hearing order are wholly consistent with the use of the Opinion No. 77 guidelines after a finding that the evidence of the parties' intent was inconclusive.

[25] 789 F.2d at 1141-42, n.32.

[26] Area rate clauses are indefinite price escalation provisions allowable under 18 C.F.R. § 154.93 (1988) that authorize an escalation in the contract price to the "applicable just and reasonable area ceiling rate."

guidelines to determine whether NGPA rates were authorized.

The language in Opinion No. 215-A cited by PSC does not establish a valid distinction between this proceeding and other proceedings to which Opinion No. 77 criteria are applicable. Opinion No. 215-A merely clarified that the holding in Opinion No. 215[27] with respect to gas purchase contracts between CIG and CIGE did not prejudice the separate and distinct but obviously similar issue in this proceeding of the intent to charge NGPA prices pursuant to the settlement.

The Commission properly found that the first criterion of Opinion No. 77 was not met because the word "established" was used in connection with the term "nationwide rate" and separated by commas from the term "area rate established by the Commission".[28] With respect to PSC's argument that the term nationwide rates was intended to refer to a Commission rulemaking in Docket No. R-389-B, the judge found that there was no conclusive showing on the intent of the parties. In addition, PSC's arguments relying on language in the Commission's order approving the settlement to establish that the Commission understood that nationwide rates referred to nationwide rates established by the Commission are mistaken. In that order, the term "deregulation" was described differently in statements relating to the old and new gas pricing provisions, and Ordering Paragraph E of that order provides, *inter alia,* that rates were to be "at the applicable area rate . . . or at such rate as may lawfully be established in the event that area rates shall not be applicable."[29]

PSC's argument that the second criterion of Opinion No. 77 was met is also incorrect. PSC's assertions that

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[27] *Transcontinental Gas Pipe Line Corporation et al.,* 27 FERC ¶ 61,180 (1984).

[28] 44 FERC ¶ 61,023, at pp. 61,088-89.

[29] *Colorado Interstate Gas Co.,* 51 FPC 74 at 81 (1974). See 44 FERC ¶ 61,023, at pp. 61,081-82.

a coupling of references to administrative action and the Natural Gas Act pervades the settlement, or is the *sine qua non* of the program, is not sufficient to meet the requirement of specific coupling in the text. PSC is also mistaken that references in the pricing provision to "applicable regulations governing area rates," optional certificate procedures, or "other pricing alternatives" contain the required coupled reference to the Natural Gas Act or the "just and reasonable" standard thereof.

PSC also erroneously submits that the Commission has not properly considered the settlement's preamble. Since the Commission has found that there was no required reference to administrative action, there can be no coupling anywhere in the settlement. However, even assuming *arguendo* that there was a reference to nationwide rates set by administrative action, there was no coupling of such action to a reference to the Natural Gas Act or its just and reasonable standard. Although there is language in the settlement's preamble referencing the "objectives of the Act" and protecting customers against "excessive and unreasonable rates," there is nothing coupling those references to rates set by administrative action.

Finally, PSC argues that the settlement and the commercial and regulatory context are unambiguous, and that CIG was not authorized to charge NGPA prices. As the Commission previously found, there was no such showing on this record.

Contrary to CIG's argument, the Commission did not improperly apply its tight sands regulations to the 1973 settlement. The Commission's decision was not based on the fact that the settlement did not contain the required "negotiated contract price" [30] language, as asserted by CIG. Although the 1981 amendments contained the necessary language, the settlement did not provide sufficient authority to negotiate the required negotiated contract

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[30] 18 C.F.R. § 271.703 (1988).

price. The settlement provided specified prices for new gas and precluded CIG from charging rates for new gas under any pricing procedure or formula other than as set forth in Article II, section 7 of the settlement. That specific language controls over the general authority in the settlement to enter into contracts "under terms and conditions reasonable and customary for gas purchase contracts" relied upon by CIG. Therefore, absent some modification of the settlement, there was no authority to establish the required negotiated contract price in the later contract amendments.

Contrary to CIG's assertions, disallowing tight sands pricing is not inconsistent with the finding that certain NGPA prices were applicable. The settlement did not provide the requisite authority to reach a subsequent negotiated contract price for tight sands. The allowance of other NGPA prices is based on a determination that the settlement permitted an automatic price escalation to NGPA prices, and no specific reference to NGPA prices is required. Such a finding does not necessarily lead to a finding that the settlement authorized the later negotiation of a higher price for tight sands gas. Therefore, CIG's contract amendments constitute a form of pricing procedure or formula other than expressly provided for in Article II, section 7 of the settlement, which is prohibited by the terms of the settlement. As the court in *Pennzoil v. FERC*, 671 F.2d 119 (5th Cir. 1982),[31] pointed out, the negotiated contract price requirement was not promulgated under FERC's authority to prescribe incentive prices but rather in satisfaction of its duty to define the gas qualifying for the price.[32]

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[31] This is a different case from either of the *Pennzoil* cases cited above, and involves approval of the Commission's tight sands regulations rather than its Order No. 23 procedures.

[32] 671 F.2d at 125. CIG argues that under this analysis a negotiated contract price does not establish a pricing procedure or formula. However, the Commission's definition of the qualifying tight sands gas clearly includes a pricing procedure or formula by

The tight sands price is not the applicable area rate for a designated tight sands formation, as alleged by CIG. The Commission explained in Order No. 99 why the tight sands price should not apply to all tight formation gas, stating that:

> The Commission believes that the price ceiling, if applied to all tight formation gas may operate as a windfall to sellers rather than an incentive to increase production of "tight formation gas." This occurs in any case in which one incentive price is established to cover a broad range of production costs and risks. This is especially true where the parties to the contract did not contemplate the availability of an incentive price. The Commission believes that the imposition of the negotiated contract price requirement is therefore necessary to ensure that a purchaser is given an opportunity to bargain for increased production of tight formation gas before he agrees to pay a price higher than the otherwise applicable maximum lawful price.[33]

Therefore, under Order No. 99 the tight sands price does not apply as an area rate for tight sands gas unless the negotiated contract price requirement is met.[34]

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requiring a negotiated contract price in order to qualify for the tight sands price.

[33] Regulations Covering High Cost Natural Gas Produced From Tight Formations, Order No. 99, *FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,183, at pp. 31,272-273 (1980). CIG mistakenly argues that the Commission decision implies that the subject gas purchase contracts were not amended as an incentive for the production of additional tight sands gas. The Commission decision does not address this point. The Commission's discussion is directed to its findings that the signatories to the 1973 agreement never had an opportunity to participate in the bargaining process, and that the prohibition in the settlement of prices derived from any pricing procedure or formula not specified in its pricing provision was controlling.

[34] CIG also argues that other types of incentive prices were allowed under the settlement, including special relief. Even assum-

CIG's assertion that the course of performance of the parties to the settlement demonstrates an intent to allow tight sands pricing is also mistaken. CIG argues that constructive knowledge through agents may be implied to meet the definition of the course of performance under UCC Section 2-208.[35] However, as the judge found, the evidence does not show knowledge by anyone who could be expected to know that charging these particular NGPA prices was a possible violation of the 1973 settlement. Therefore, there was no showing of sufficient knowledge by anyone on behalf of the parties, agent or otherwise, of the true nature and significance of the performance. CIG's related argument that the settlement should be reformed to include negotiated contract price language due to parties' course of performance is also rejected. There was no showing of intent, knowing acquiescence, or action by any party to the settlement which would support modification or reformation of the settlement. In any case, a settlement approved by this Commission cannot be modified by the parties' conduct. Any modification must be approved by the Commission.[36]

CIG's argument that it should be permitted to withdraw the subject tight sands reserves from the program

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ing *arguendo* that position to be correct, special relief is distinguishable from tight sands pricing due to the negotiated contract price requirement, which constitutes a pricing procedure or formula barred by the settlement.

[35] U.C.C. § 2-208 defines "course of performance" as:

> (1) Where the contract for sales involves repeated occasions for performance by either party with knowledge of the nature of the performance and the opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

[36] Opinion No. 77 at n. 22 (10 FERC at p. 61,408) does not, as alleged by CIG, recognize that a course of conduct may modify the terms of a settlement. That footnote expressly refers to "contractual language" and is silent as to settlements.

is rejected. These reserves have already been committed to the program pursuant to the settlement. CIG's reliance on Article II, section 8 of the settlement as the basis of its argument is totally unfounded. Section 8 sets forth the requirement of 275 Bcf as a minimum reserve commitment for the customer-funded exploration program. CIG is correct that there is a requirement that the minimum reserves committed be met under contracts with pricing and other provisions in accordance with Article II, section 7 of the settlement. However, our order in this proceeding results in a price for the gas consistent with the provisions of the settlement. Further, CIG raises the possibility in its request that withdrawal of the reserves may produce a shortfall in the minimum reserve commitment. Such a shortfall would be contrary to the objectives of the settlement. Finally, the refund amount of 18.5¢ per Mcf proposed by CIG based on Article II, section 9 of the settlement was to be applicable only in the event of a shortfall in the minimum reserves dedicated to CIG pursuant to the gas exploration and development program. There was no such shortfall.

In addition, CIG has not shown any factor supporting reasonable detrimental reliance. There was no showing that PSC informed CIG that it would not pursue the NGPA pricing issue, which would support a claim of detrimental reliance by CIG. Nor was there undue delay in raising the subject complaints by PSC or any other party to the settlement that would justify adoption of CIG's argument due to equity. Similarly, CIG's assertions concerning PSC's lack of questioning the NGPA pricing, and CIG's reliance on events related to the tight sands rulemaking, do not establish reasonable detrimental reliance—particularly in view of our findings on course of conduct and the negotiated contract price requirement. Further, CIG's equitable argument that it met the minimum reserve commitment must be viewed in the context that such action was a requirement of the settlement. In

any case, none of CIG's equitable arguments outweighs the fact that the customers contributed to the funds with which these reserves were acquired.

CIG's argument that the Commission improperly applied the *Martin Exploration* decision and Order No. 406 retroactively is erroneous. While the Commission's decision is consistent with the Supreme Court's decision in *Martin Exploration*, which affirmed Order No. 406, it is not based on a retroactive application of that decision. The Commission's decision with respect to deep new gas was based on its interpretation of section 101(b)(5) of the NGPA that when gas qualifies for both regulated and deregulated treatment under the NGPA, the deregulated price governs, and that the settlement's pricing provisions for deregulated gas thus apply.[37] Therefore, as of November 1, 1979, when gas that qualified under section 107(c)(1) was deregulated, the annual escalation of 1.5¢ per Mcf applies rather than the section 102 and 103 prices. This conclusion was also based on section 121 of the NGPA, which eliminated price controls on section 107(c)(1) deep gas as of November 1, 1979. In Order No. 78,[38] implementing NGPA section 121(b), the Commission adopted section 272.102(a) of the Commission's regulations, which stated that "[n]o maximum lawful price applies to any first sale of deregulated high-cost gas" and section 272.103, which includes deep, high-cost gas in the definition of deregulated high-cost gas. Order No. 406, which the Supreme Court affirmed in *Martin Exploration*, found that under NGPA section 101(b)(5), when gas could qualify for a regulated or deregulated category, the

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[37] Article II, section 2 of the agreement provided that the price of new gas "in the event that area rates should cease to be applicable to such gas" would be the "area rate price in effect prior to Deregulation, escalating at the rate of 1.5¢ per Mcf" annually thereafter.

[38] Final Rule Defining and Deregulating Certain High-Cost Gas, *FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,147 (1980).

deregulated price, which always could result in a price higher than the regulated price, prevails.[39] Therefore, the Commission's interpretation of the terms of the settlement is consistent with the NGPA, its previous views, and *Martin Exploration*, but is in no sense a retroactive application of that decision.

With respect to CIG's equitable arguments, no basis has been shown to establish reasonable reliance based on CIG's view that under the settlement it would have a choice between treating the new deep gas as price regulated or deregulated, or on the fact that CIG gave notice to customers of its choice through its purchased gas account (PGA) filings. The Commission's order is a reasonable and foreseeable interpretation of the NGPA as applied to the terms of the settlement, not a retroactive application of later decisions. Further, as pointed out above, it has not been shown that anyone at the subject organizations had knowledge of the true nature of CIG's potential violation of the terms of the settlement during the relevant period. Under such circumstances, it was not reasonable for CIG to rely on notice through a PGA filing to immunize it for violations of the settlement.

CIG is mistaken in its assertion that the Commission has no authority to require refunds of principal or related interest on the deep new gas after November 1, 1979, and tight sands gas after January 1, 1985, since there were no maximum lawful prices for such gas which CIG's charges could have violated after those dates. The refunds and interest were ordered due to the violation of the terms of the settlement which established price limitations on such gas.

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[39] *See FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶ 30,614, at pp. 31,128-29 (1984), and *order on reh'g, FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶ 30,622 (1984) (Order No. 406-A) at p. 31,245. Order No. 406 is codified in 18 C.F.R. § 270.208 (1987).

The judge was correct in rejecting CIG's laches and estoppel arguments on the basis that the parties did not unreasonably delay the initiation of their complaints. Further, no equitable arguments raised by CIG outweigh the need to enforce the terms of the settlement when the customers have already fulfilled their part of the bargain by providing the funds for the exploration program.[40]

CIG mistakenly argues that the remedy is an unlawful penalty which violates the filed rate doctrine by retroactively changing CIG's filed rate, and is an unconstitutional taking of property in violation of the Fifth Amendment to the United States Constitution. The enforcement of the settlement prevents unjust enrichment and is not an unlawful penalty. The Commission's remedy enforces the 1973 settlement and is not a retroactive rate change. Further, it is not a denial of due process to require CIG to comply with the terms of the settlement.

CIG's arguments related to the public interest were previously considered by the judge. The Commission may allow repayment over a period of time after the actual quantity of the refund obligation is known. Accordingly, CIG will be required to file a report within 45 days of the date of this order setting forth the amount of repayment due, including interest, and the proposed repayment plan. CIG and the other parties will also be required to follow the remainder of the related procedural schedule adopted by the judge.

With respect to the transfer of the undeveloped leases, the controlling language in Article II, Section 13 of the 1973 settlement provides that CIGE make provision:

> for the liquidation, disposition, or other appropriate and equitable treatment for the benefit of the Pro-

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[40] In addition, as discussed above, there has been no showing that PSC unequivocally informed CIG that it would not pursue the NGPA pricing issue which would support a finding of reasonable detrimental reliance or undue delay.

gram Fund of interests in leasehold remaining undeveloped on such termination and acquired by the Program Fund expenditures, and for such other matters as may be required to wind up the affairs of the Program in a reasonable, orderly and equitable manner.

As the judge found, it would not be equitable to transfer the undeveloped leases acquired by the customer's program funds at the book value or amount paid for such leases. The customers whose funds were used to acquire such leases are entitled to a transfer at market value. CIG's arguments related to the price paid to acquire the leases and proposed valuation related to vehicles and office equipment are misplaced. These undeveloped leases were acquired with customer's funds and there is potentially a large increase in market value above book value, which should be paid into the Program Fund. Further, the market value study of CIG was properly rejected by the judge on the basis that the factual foundation upon which it was based was not persuasive. The judge's determination on the disposition of the fair market value so determined is affirmed.

The parties will be given 90 days from the date of this order to either agree on the fair market value of the undeveloped leases acquired with program funds or submit to the Commission a schedule for submission of evidence on this matter.

The Commission orders:

(A) The timely requests for rehearing and Denver's request for reconsideration of Opinion No. 306 are denied.

(B) Within 45 days of the date of this order, CIG shall file the report required. The parties shall also follow the remaining portion of the procedural schedule established by the judge in his initial decision.

(C) Within 90 days after the date of this order, the parties must either agree on the value of the undeveloped leases acquired with Program Funds or individually or separately submit to the Commission a procedural schedule for taking additional evidence on this matter. To the extent that the fair market value is less than $12.9 million, CIGE should be credited for that difference in connection with its repayment obligations; to the extent the fair market value exceeds $12.9 million, CIGE should pay that difference into the Program Fund.

APPENDIX G

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners:

Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon and Charles A. Trabandt.

Docket No. CP73-184-002

COLORADO INTERSTATE GAS COMPANY
a Division of Colorado Interstate Company

Docket No. CI73-485-002

CIG EXPLORATION, INC.

OPINION NO. 306;
OPINION AND ORDER AFFIRMING IN PART
AND REVERSING IN PART
INITIAL DECISION
(Issued July 7, 1988)

This proceeding involves exceptions filed to the initial decision of the presiding judge [1] interpreting a 1973 settlement agreement concerning a gas exploration program between Colorado Interstate Gas Company and its affili-

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[1] 32 FERC ¶ 63,033 (1985).

ates (referred to as CIG unless otherwise indicated) and CIG's customers. The principal issued presented is whether, after passage of the Natural Gas Policy Act of 1978 (NGPA), the pricing provision of the agreement permitted the collection of incentive prices under NGPA sections 102, 103, 107 and 108. The initial decision held that it did not, and determined the price that could be collected. We conclude this was erroneous and reverse.

I. Background

A. The 1973 Agreement

In 1973, CIG was, as were many other pipelines, faced with a serious supply shortage. CIG also had serious problems in financing the exploration for and development of new gas supplies. At that time CIG, as a pipeline producer, received under the Natural Gas Act (NGA), for company-owned production, cost-of-service pricing treatment for its "old" gas (production from leases acquired prior to October 7, 1969) and area rate pricing for "new" gas. Any producing affiliate in 1973 would also receive the same pricing treatment.[2] In 1973, CIG and its customers entered into an agreement and stipulation (the agreement) to provide CIG's customers with new gas supplies. Under the agreement, CIG would transfer its production properties to a new subsidiary, CIG Exploration Inc. (CIGE). CIGE would be permitted to receive the higher area rate rather than the cost-of-service rate for the old gas produced from these properties. In turn CIG was required to expend for exploration, development and production of new gas reserves, a minimum of $50.9 million (the Fund). This

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[2] In 1974, the Commission in Opinion No. 699-H, 52 FPC 1604, redefined "old" and "new" gas produced by a pipeline or its affiliate. Only company-owned production from a lease acquired prior to October 7, 1969, and drilled from a well spudded prior to January 1, 1973, was considered "old" gas and priced on a cost-of-service basis.

sum represented the additional revenues anticipated over a five-year period from charging the area rates prevailing in 1973 as applied to "old" gas, rather than the cost-of-service rate.[3]

The agreement had specific pricing provisions governing the pricing of both "old" and "new" gas. Article II, Section 2 provided that "old" gas would be sold:

> at prevailing area rates (for purposes of this Stipulation and Agreement, unless the context otherwise requires, the term "area rate" shall mean the applicable area rate, or nationwide rate if such should be established, from time to time established by the Commission for gas of comparable quality and vintage) adjusted to recover increases in production taxes or, in the event that area rates should no longer be applicable to the Old Gas (Deregulation), at prices reflecting the area rate in effect immediately prior to Deregulation, escalating at the rate of 1¢ per Mcf for each year subsequent to Deregulation. . . .

The foregoing allowance of area rates for "old" gas was expressly limited by the following provision:

> *provided, however*, that in no event shall the sales price for Old Gas exceed an amount equal to 25¢ per Mcf plus [adjustments].

New gas was subject to the following price condition:

> [A]ll New Gas dedicated to CIG's system shall be sold by Exploration to CIG under life-of-the-field contracts, under terms and conditions reasonable and customary for gas purchase contracts with independ-

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[3] The Fund would also increase pursuant to a specific formula when CIGE dedicated "new" gas to CIG. For "new" gas reserves dedicated by CIGE at a price less than 25¢ per Mcf, CIGE would add 3¢ per Mcf to the Fund; for such reserves dedicated at more than 25¢ the addition to the Fund was 3¢ plus 12½ per cent in excess of 25¢.

> ent producers relating to reserves of comparable quality, nature and location. Each such contract shall provide for prices not exceeding the applicable area rate prevailing from time to time during the term of the contract [plus specified adjustments] . . . or in the event that area rates should cease to be applicable to such gas either before or after such contract is entered into, shall provide for a price reflecting the area rate in effect immediately prior to Deregulation, escalating at the rate of 1.5¢ per Mcf for each year subsequent to Deregulation, and [adjustments] . . . . Exploration shall not seek certification for any New Gas under the optional certification procedures adopted by the Commission . . . . nor shall it charge rates for any New Gas under any pricing procedure or formula other than as set forth in this Section 7.

The agreement also provided that CIG and CIGE were to wind-up the program within seven years.

The Commission approved the agreement in 1974.[4] The Commission found that the 1973 settlement was "in the public interest," noting that the proposal was similar to other Commission approved programs based upon increased revenues from company-owned production.

The Commission described the arrangement as follows:

> These proposals which establish an exploration and development fund to finance the cost of finding and developing new supplies of natural gas within the United States represent an opportunity for a pipeline company to acquire the lowest cost supply of gas for resale to its customers. In effect, these proposals represent a sharing of the risk of finding and producing new supplies of natural gas by the pipeline company and its customers. While the present settlement agreement is patterned after the adopted

[4] *Colorado Interstate Gas Co.*, 51 FPC 74 (1974).

proposals in the *Panhandle Eastern*[5] and *Natural* cases,[6] it represents the needs of CIG's customers and reflects their position that they should have a share in all of the valuable minerals which may be found as a result of the expenditure of monies from the Fund.

In describing the pricing arrangement, the Commission stated:[7]

> As in the *Panhandle* case Exploration [CIGE] shall be authorized to sell natural gas produced from the leases acquired from CIG to CIG at the applicable area rate established by this Commission. (This gas is referred to as "Old Gas".) The term "area rate" is defined to include a "nationwide rate" should such rate be established by the Commission. In the event that the price of the Oid Gas is not regulated by this Commission, Exploration is contractually authorized to sell the Old Gas at the applicable area rate in effect immediately prior to such nonregulation with a 1.0 cent per Mcf per annual escalation and subject to adjustments to cover increased production taxes and royalty payments. The maximum price for the Old Gas is established as 25.0 cents per Mcf before adjustment for production taxes and royalty payments. . . . (footnote omitted.)
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> * * * *
>
> Sales of New Gas (Natural gas produced from leases acquired through the use of Fund monies) will be made by Exploration to CIG under life-of-the-field contracts at prices not exceeding the applicable area rate (or national rate if such shall be established by the Commission) subject to adjustments. . . . Should

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[5] *Panhandle Eastern Pipe Line Company*, 48 FPC 518 (1972).

[6] *Natural Gas Pipeline Company of America*, 50 FPC 368 (1973).

[7] 51 FPC at 78-79.

> the price of New Gas be not regulated, Exploration shall be entitled to sell the New Gas to CIG at the applicable area rate in effect immediately prior to nonregulation with a 1.5 cent per Mcf annual escalation and subject to adjustments for royalty payments and production taxes. . . .

It should be noted that the Commission described "deregulation" in different ways in the two pricing provisions. For old gas, deregulation was said to occur "in the event that the price of old gas is not regulated by this Commission" (emphasis added). However, for new gas, deregulation was defined as "should the price for New Gas be not regulated."

In Ordering Paragraph (E) the Commission provided that:

> (E) Exploration is hereby authorized for a period of five years from the date of this order . . . to price natural gas produced from the Production Properties acquired from CIG at the applicable area rate from time to time established by the Commission for natural gas of comparable quality and vintage, *or at such rate as may lawfully be established in the event that area rates shall not be applicable to natural gas produced from these properties*, instead of the cost of service basis at which such natural gas is now priced by CIG to its customers. (emphasis added.)[8]

B. The NGPA

In 1978 the NGPA sharply curtailed the Commission's authority to set wellhead prices, and Congress established statutory ceiling prices for various categories of gas. These prices were substantially higher than those the Commission had set, but private parties were free to bargain for lower rates. Producers could sell their gas at the NGPA price only if the gas met categorical statutory

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[8] *Id.* at 81.

criteria and had been sold under a contract that authorized, or could be read to authorize, the NGPA price. The question then arose whether area rate clauses, which had been sufficient to supply contractual authorization for price increases under the NGA, would also suffice to permit increases to the NGPA ceiling price.[9]

The Commission addressed this issue in the Order No. 23 rulemaking.[10] In *Pennzoil Company v. FERC*, the court noted that the rulemaking led the Commission to conclude:

> that neither the language of the NGPA nor Commission regulations precluded authorization of NGPA rates through area rate clauses. Nevertheless, the Commission also concluded that it could not dispositively construe all such area rate clauses. Rather, the Commission concluded that it would ascertain and give effect to the contracting parties' intent and that it would not object generally to the parties' reliance on area rate clauses as authority to collect NGPA prices.[11]

Thus, if the parties intended to allow the contract price to increase to the highest relevant ceiling set by regulatory authorities, then the clause would supply the requisite

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[9] An "area rate clause" is an indefinite price escalation provision allowable under 18 C.F.R. § 154.93 (1986), which authorizes an escalation in the contract price to the "applicable just and reasonable area ceiling rate."

[10] Order No. 23, *FERC Statutes and Regulations, Regulations Preambles* 1977-1981 ¶ 30,040 (1979); Order on Rehearing of Order No. 23 [7 FERC ¶ 61,152]; Order No. 23-A, *FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,058 (1979), Order on Rehearing of Order No. 23-A [8 FERC ¶ 61,158]; Order No. 23-B, *FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,065 (1979); Order on Rehearing of Order No. 23-B, *FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,073 (1979).

[11] 789 F.2d 1128, 1132 (5th Cir. 1986).

authority to charge the NGPA price. If, on the other hand, the parties merely intended to allow increases to the highest ceiling set by a cost-based methodology as under the NGA ratemaking proceeding, with participation by interested persons and, ultimately, judicial review, then the clause would not suffice to authorize a price rise to the maximum NGPA level.[12]

With the inception of the NGPA, CIG began paying CIGE for "new Gas" at the incentive prices provided under the NGPA. In 1982 Public Service Company of Colorado (PSC), a CIG customer and a party to the 1973 agreement, filed a civil action asserting that CIG had violated the pricing provision by paying the NGPA price. Subsequently, the matter came before the Commission and on March 30, 1984, the Commission issued an order setting this case for hearing to resolve:

> (1) Whether the 1973 Settlement authorizes CIG to pay and CIGE to receive the NGPA maximum lawful rates beginning December 1, 1978 for "New Gas" . . .
>
> (2) Whether CIG's final accounting and report, filed on August 25, 1981, is incorrect and therefore requires refunds to be made to CIG's customers; and
>
> (3) Whether the expenditure of Program funds by CIGE for the exploration of natural gas during the two-year wind-up period is a breach of the 1973 Gas Search Settlement Agreement. If the expenditure is determined to be a breach of the Gas settlement, the measure of damages, if any, must be determined.[13]

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[12] *Independent Oil & Gas Association*, Opinion No. 77, 10 FERC ¶ 61,214, at p. 61,397 (1980).

[13] 26 FERC ¶ 61,422 (1984). The parties agreed that the issues in the civil litigation would be resolved by the Commission.

II. The Initial Decision

The agreement authorized CIG to collect the area rate for new gas but also provided for a specific price in the event of "deregulation". The issue presented is the impact of the NGPA upon the parties' agreement. On the one hand, CIG contended that the area rate authorized escalation to the NGPA prices; on the other hand, its customers asserted that the enactment of the NGPA constituted deregulation, thereby invoking that price provision under the agreement.

The judge found that (1) the agreement and Commission order approving it are "ambiguous" (32 FERC at p. 65,111) and not "determinative of what the parties intended to occur in the NGPA setting" (*Id.* at p. 65,105); (2) the purposes and circumstances of the agreement do not overcome its ambiguity, *Id.*; and (3) the conduct of the parties after the NGPA does not unequivocally indicate any particular interpretation of the agreement (*Id.* at p. 65,121). He further found that the "subjective intentions" of the parties are inconclusive because they "correspond to the conflicting positions taken . . . and therefore do not resolve what was intended" (*Id.* at p. 65,105). He concluded that "there was no meeting of the minds as to what the price would be for 'new' gas if Congress were to establish ceiling prices on an incentive basis." Thus while CIG thought it could pay its affiliate, and charge its customers any "regulated" rate, its customers thought regulated meant "cost-based." *Id.*

In light of the finding of ambiguity, the judge stated that "reference is made back to the Commission and court guidelines on how ambiguous contracts are to be handled." (*Id.*) He held that the "criteria set out in Opinion No. 77 by which the intent of contracting parties is determined are not applicable because of the unique nature of

the 1973 Settlement" (*Id.*).[14] The judge concluded that there was an omitted term as to the pricing of new gas under the NGPA, and that it was his function to supply that term on the basis of what was "reasonable," and consistent with relevant case law and the Uniform Commercial Code. This he stated uld be based on the following:

> First . . . [the parties] would have agreed to be bound by government regulated prices so long as the regulation was based on costs, and second, if government regulation should lead to incentive pricing, the amount of the price above a price based on costs would be shared according to the contributions made to the Program Fund. (*Id.* at p. 65,105).

The judge determined that it was reasonable, in the context of ratepayer funding, that CIG/CIGE and their customers share in the windfall increment above cost-based rates in the same proportion as their contributions to achieving the windfall. This was because the agreement (Art. II, Sec. 10) provided that CIG's customers would "equitably share in the benefits of . . . New Gas . . . to the extent [they] made possible the [exploration monies]" used to discover the new gas.

The judge found that CIG's customers allegedly contributed sixty percent of the monies to the Fund while CIGE contributed forty percent. Accordingly, a reasonable post-NGPA price was the NGPA section 104 price [15] plus forty percent of the difference between the section 104 price and the maximum incentive NGPA price otherwise available for each category of New Gas sold. Further, if New Gas would qualify for more than one NGPA

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[14] However, he stated in *dicta* that if those criteria were applied, the necessary conclusion is that CIGE was entitled to receive NGPA rates (*Id.* at p. 65,126).

[15] The NGPA section 104 price essentially took the applicable area rate at the time the NGPA was enacted and escalated it by an inflation adjustment factor.

price, the judge held that the price should be based on the highest incentive price, reduced as above, except for the price of tight sands gas. So long as any incentive price was available, it would govern, with the section 104 pricing becoming applicable only if no other incentive price was available. The judge held that the section 107 "tight sands" price was not authorized because there had not been, as required by the Commission's regulations, any agreement on this price by CIG's customers.[16] The judge ordered that CIG and CIGE file a report showing their refund liability, with interest, and that effective October 22, 1985, CIG was to escrow any difference between the prices chargeable by CIGE under his decision and those that would otherwise be paid to CIGE.

On the other issues, the judge held that the transfer of undeveloped leases from the program fund to CIGE at the end of the program should have been accomplished on the basis of the current market value of the leases rather than cost, as CIG had done (*Id.* at p. 65,137); that CIG had properly priced the 7.7 Bcf of Gas Search reserves dedicated under contracts with third parties, which did not contain the "Deregulation" pricing language required by the 1973 Agreement (*Id* at pp. 65,138-40); and that the claims against CIG relating to expenditures for surface facilities and the allocation of overhead to the Program Fund were without merit (*Id.* at pp. 65,137-40). Finally, the judge ruled that CIGE had not acted improperly by continuing drilling and lease acquisition activity during the wind-up period (*Id.* at pp. 65,143-46).

III. Position of the Parties

On the major issue in this proceeding, both CIG and its customers contend that the judge erred in establishing the 60/40 ratio. However, they differ on the consequences of reversing the initial decision.

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[16] 18 C.F.R. § 271.703 (1986).

CIG maintains that the criteria of Order No. 77 are applicable, and since the judge found that the agreement met the criteria, the New Gas price could be escalated to the NGPA incentive price.[17] Further, even if the Opinion No. 77 criteria are not applicable, CIG argues that the method used by the judge to determine the reasonable price is erroneous. CIG asserts that if there was no meeting of the minds on the price term, CIG is entitled to receive the "reasonable value" of the goods, which is the NGPA incentive price. CIG's customers contend that the deregulated price specified in the contract applies, not the 60/40 price.[18] They also contend that there is no basis in the record for the 60/40 ratio because CIG's customers supplied all the risk capital.

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[17] We agree with the judge's conclusion that nothing in the testimonial or documentary evidence presented by CIG/CIGE demonstrated that the conduct of the parties during and subsequent to the gas search program evidenced an intent by CIG's customers to permit or acquiesce affirmatively in the collection of NGPA rates by CIG/CIGE. Even if CIG's customers, including PSC, theoretically had constructive notice of the fact that CIG was collecting NGPA rates through CIG's purchase gas adjustment filings with the Commission and its annual gas search program reports, the fact that PSC did not formally take action respecting the NGPA pricing issue until December 1982 did not amount to a "course of performance" under section 2-208 of the Uniform Commercial Code, which requires knowledge of the action taken. The judge determined constructive notice of knowledge was insufficient, and that CIG/CIGE had failed to demonstrate (as is required by U.C.C. § 2-208) that the principals of PSC who negotiated the 1973 Settlement had actual knowledge of the nature of CIG/CIGE's performance that allegedly constituted a violation of the agreement.

[18] Staff excepts to the judge's dicta that if the Opinion No. 77 criteria were applicable, then escalation to NGPA incentive prices would be permitted. Staff asserts (and CIG's customers concur) that the agreement contains language which would preclude NGPA pricing.

IV. Discussion

A. Are the Opinion No. 77 Criteria Applicable?

In this case the judge found an ambiguity between the pricing language in the agreement and the Commission order approving it. After reviewing the testimony offered by the parties, he concluded that there was no meeting of the minds on what price would be placed on "new" gas if the Commission ceased to be the regulatory body setting rates, and Congress undertook that task, and particularly if Congress set the rates primarily on an incentive basis instead of the primarily cost basis used by the Commission in the past.[19] He then held "the criteria set out in Opinion No. 77 by which the intent of contracting parties is determined are not applicable because of the unique nature of the 1973 Settlement." [20] However, he later stated that if "they were [applicable], the criteria to preclude use of pertinent NGPA prices do not exist." [21] Finding no agreement upon a crucial term, and the Opinion No. 77 criteria not being applicable, the judge supplied a "reasonable price," supposedly consistent with relevant case law and the Uniform Commercial Code, to replace the effectively "omitted" term on which there had been no agreement.[22]

We disagree with the judge's conclusion that the criteria of Opinion No. 77 are not applicable. The agreement represented the parties' agreement concerning the pricing of gas from CIG's properties. While this may be different from the traditional agreement between producers and their purchasers, we fail to see why the criteria are not

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[19] 32 FERC at p. 65,119.

[20] *Id.* at p. 65,105.

[21] *Id.* at p. 65,126.

[22] *Id.* at pp. 65,126-131.

applicable.[23] The pricing provisions of the agreement were customary area rate clauses, with a "Deregulation clause" containing a specific price. The issue presented by an indefinite price escalation clause is whether the parties intended by the language used "to allow the maximum rate permitted by law," or whether "only administratively, cost-based rates" were intended. Of course, if the parties specifically spelled out another permissible arrangement, we would carry out that intent. We recognize, however, that the agreement in question was entered into many years prior to enactment of the NGPA. Certainly we do not expect parties to have foretold the future. Rather, as Opinion No. 77 indicates, it is our duty to construe the contract, using the criteria set forth herein.

In the Order No. 23 series, the Commission concluded that it would ascertain and give effect to the contracting parties' intent. In Opinion No. 77, the Commission enunciated general criteria with regard to contractual interpretation, and specifically referred to a situation like this one where "the parties cannot agree on an interpretation of the area rate clause":

> However, if the parties themselves can not agree on the interpretation of an area rate clause, the Commission obviously can not be guided by either of their conflicting statements of intent. In such cases, the Commission must itself construe the contract. The starting point for analysis is the text of the contract.
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> In those cases where there is no reliable and probative evidence of intent or where such evidence is

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[23] Opinion No. 77 itself dealt with indefinite price escalator clauses in two settlement agreements approved by the Commission in 1976, prior to the NGPA. Those settlements further provided for the renegotiation of price in the event of deregulation.

> inconclusive, the Commission will ascertain the intent of the parties on the basis of the test of the clause in dispute.[24]

To adopt the judge's position would virtually rule out the criteria in any two-party protest cases.[25] Yet the courts have implicitly recognized the validity of those criteria in two-party situations.[26] Moreover, in *Pennzoil v. FERC*, *supra*. n.13, the court held that in third-party protest cases where the presumption of intent to pay the NGPA price no longer governs, the Commission must decide the case by applying the criteria under the two-party situation.[27]

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[24] 10 FERC at p. 61,398.

[25] Order No. 23 also discussed the procedure applicable where the parties to the contract agree on their intent, but third parties challenge that interpretation. In such "third party protest" cases, the contracting parties' agreement on their intent that the area rate clause authorized price increases to the maximum permitted by law established a presumption which protestors were required to rebut in order to obtain a hearing.

[26] In *Associated Gas Distributors v. FERC*, 810 F.2d 226 (D.C. Cir. 1987), the court affirmed the Order No. 23 presumptions set forth in Opinion No. 77, and the restatement of the Opinion No. 77 formulation in Opinion No. 135, 17 FERC ¶ 61,232 (1981).

[27] The court stated (789 F.2d at 1141-42 n. 32):

> In two-party protests, the Commission stated that it would "construe the contract language utilizing the guidelines established in Opinion No. 77 if neither party is able to establish intent[,]" because the parties disagree over the meaning of the clause and their intent at the time of its execution. Opinion No. 181-A at 61,371. Therefore, "the language of the contracts is the only reliable evidence of intent and the Commission will independently construe it in order to resolve the case if the evidence is inconclusive." . . . In large measure, it is apparent to this court that the Commission's difference in treatment between third-party protests stems from its construction of the Order No. 23 presumption. Once the presumption disappears, the central question presented in third-party protests becomes the same as in two-party protests—the proper construction to be given the contracts.

The CIG agreement, while different from the usual producer-pipeline contract, was not unlike other arrangements entered into at that time, arrangements which the Commission noted in its order approving the agreement. Under these circumstances we conclude that Opinion No. 77 criteria are applicable to CIG's agreement in determining the intent of the parties.

B. The Opinion No. 77 Criteria

The judge stated that there was no "meeting of the minds" as to what would occur if Congress and not the Commission regulated the price. He then proceeded to supply the missing term by determining what he thought the parties would have agreed to had they addressed that possibility. We believe that this was not proper and goes beyond the Commission's role in these types of disputes. In this case, as in other disputed "area rate" escalation cases, the parties did not spell out what would happen if Congress instituted an incentive based price. It is the Commission's task to interpret the contract and determine what was intended by the agreement that was entered into, not to discern the agreement the parties would have entered into if they had anticipated that specific occurrence.[28] The Commission articulated criteria in Opinion No. 77 to assist in determining that intent.

In Opinion No. 77, the Commission held that where the parties to a contract disagree as to interpretation of the area rate clause as they do here:

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[28] The judge's reliance on *North Central Airlines v. Continental Oil Co.*, 574 F.2d 582 (D.C. Cir. 1980), is misplaced. In that case the contract referred to a "posted price". After price controls were instituted there were two posted prices, and there was no basis for choosing one price over another. The court directed the trial court to determine what was a reasonable price under those circumstances. However, in this case it is not a matter of the contract providing two different prices, but whether the area rate clause permits escalation to the NGPA incentive prices.

> [T]he Commission will ascertain the intent of the parties on the basis of the text of the clause in dispute. In such situations, we will generally conclude that a contract containing an area or national rate clause does not authorize collection of all NGPA rates if it contains the following disqualifying terms:
>
> (1) It refers to rates established or prescribed by an administrative body;
>
> (2) It couples the reference to administrative action with a reference to the Natural Gas Act or the "just and reasonable" standard of that Act; and
>
> (3) It contains no additional language which has the effect of uncoupling the link between agency action and the statutory standard of the Natural Gas Act.
>
> * * *
>
> If these disqualifying terms are not all present, we would generally find that an area or national rate clause authorizes NGPA rates. [emphasis in original].[29]

The judge stated in *dicta* that the Opinion No. 77 criteria to preclude NGPA pricing were not met. He found that the first criterion, "a rate established or prescribed by an administrative body," was not satisfied because the clause did not clearly provide that the nation wide rate would be established by the Commission. This apparently was based on the fact the word "established" was used in connection with nationwide rate separate from "area rate established by the Commission" [30] so that the nationwide rate was not "necessarily one established

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[29] Opinion No. 77, 10 FERC at p. 61,398.

[30] Area rate was defined in the agreement as "the applicable area rate, or nationwide rate if such should be established, from time to time established by the Commission." 32 FERC at p. 65,125; *see* p. 2 *supra*.

by an administrative body." [31] However, he found that the criterion, "coupling the reference to administrative action with a reference to the Natural Gas Act or the just and reasonable standard of that Act," was satisfied. He held that although the pricing clause did not have the necessary coupling, any other part of the contract could supply it, and that the preamble met this criterion.[32]

We agree with the judge that the Opinion No. 77 criteria to preclude NGPA pricing were not met. However, we find that the second criterion was also not satisfied. The preamble does not provide the necessary coupling because a preamble is, by its nature, general and not meant to provide specific guidance. Furthermore, Opinion No. 77 discussed whether "the area rate clause refers to rates established under the Natural Gas Act." [33] This coupling in the clause could be overcome by "subsequent language in the contract [which] uncouples the escalation clause from the Natural Gas Act." [34] Thus, the most reasonable interpretation of the criterion is that the coupling should be found in the escalation clause, but that uncoupling can occur in any other part of the contract. In this case there was no coupling in the escalation clause, and thus this criterion to preclude NGPA pricing was not satisfied.

The Opinion No. 77 criteria apply to situations like the one in this case where the parties to the contract disagree over intent. Where the extrinsic evidence does

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[31] *Id.* at p. 65,125.

[32] The preamble to the agreement stated, in part:

> All parties . . . were able to arrive at a basis for the issuance of the authority sought . . . which . . . will serve the public interest . . . while at the same time conforming to the objectives of the Act in protecting CIG's resale customers against excessive or unreasonable rates.

[33] Opinion No. 77, fn. 17.

[34] *Id.*

not resolve the issue, as the judge held in this case it did not, the issue is to be determined by interpreting the contract language under those criteria.[35] Accordingly, we hold that the Opinion No. 77 criteria were applicable, and because the language of the agreement did not preclude NGPA prices under those criteria, there was contractual authorization to pay the NGPA incentive prices.

C. The Applicable NGPA Price

Having concluded that the agreement authorized escalation to NGPA prices, it is necessary to determine the applicable NGPA prices. We find no error in the judge's conclusion that the tight-sands gas could not qualify for the incentive price under NGPA section 107(c)(5).[36]

In order for tight-sands gas to qualify for the special section 107(c)(5) tight-sands incentive price (200 percent of the section 103 ceiling price), the sale of the gas must be governed by a "negotiated contract price."[37] Section 271.702(a)(1) defines "negotiated contract price" as "any price established by a contract provision that specifically references the incentive pricing authority of the Commission under section 107 of the NGPA, by a contract provision that prescribes a specific fixed rate, or by the operation of a fixed escalator clause." Although CIG and CIGE agreed to contractual amendments in 1981 which contained the necessary surcharge to satisfy the regulation, we agree with the judge that these amendments did not constitute a "negotiated contract price" as required under the Commission's tight-sands regulations because the "new gas" pricing provisions precluded CIG/CIGE from charging rates for new gas under any pricing procedure or formula other than as set forth in Article II, section 7 of the Settlement.

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[35] *See Pennzoil, supra* n. 11; *United Gas Pipe Line Company*, 37 FERC ¶ 61,249 (1986).

[36] 15 U.S.C. § 3317(c)(5) (1982).

[37] 18 C.F.R. § 271.703 (1986).

Sellers whose contracts do not contain a negotiated contract price may negotiate with the buyer to amend the contract.[38] The Commission stated in Order No. 99 (where the Commission promulgated the negotiated contract price requirement) that the purpose of the requirement is "to insure that the incentive maximum lawful price is extended as an *incentive* for the production of additional new tight formation gas, rather than as a windfall to the sellers."[39] The signatories to the 1973 Agreement never had an opportunity to participate in the bargaining process since the contract renegotiation took place between affiliates CIG and CIGE. The Commission had noted in Order No. 99 that "the imposition of the negotiated contract price requirement is therefore necessary to insure that a purchaser is given an opportunity to bargain for increased production of tight formation gas before he agrees to pay a price higher than the otherwise applicable maximum lawful price."[40] Given the express language in the "new gas" pricing provision prohibiting any form of pricing other than that specifically provided for in Article 7, we find that absent some affirmative assent for modification to the Agreement agreed to by the signatories, CIG and CIGE did not have the contractual authority to reach a "negotiated price" as is required under the Commission's regulations. We find nothing inconsistent with our other conclusions that NGPA prices were applicable, because to collect the tight formation price, specific agreement to that incentive price is required. In contrast, the area rate clause permits automatic escalation to the NGPA prices, once the requisite intent is found, and no specific reference to NGPA pricing is required.

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[38] Regulations Covering High Cost Natural Gas Produced From Tight Formations, Order No. 99, *FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,133, at p. 31,271 (1980).

[39] *Id.*

[40] *Id.* at p. 31,273.

In view of our decision, one further ruling by the judge must be reviewed. Under NGPA section 107(c)(1), production from a completion location at a depth greater than 15,000 feet qualifies as high-cost natural gas if the surface drilling of the well producing that gas began on or after February 19, 1977. The maximum lawful price for section 107(c)(1) deep gas ceased to be applicable by virtue of NGPA section 121,[41] which deregulated gas under sections 107(c)(1)-(4) as of November 1, 1979, when incremental pricing became effective.

Article II, section 2 of the agreement provided that the price of new gas "in the event that area rates should cease to be applicable to such gas" would be the "area rate price in effect prior to Deregulation, escalating at the rate of 1.5¢ per Mcf" annually thereafter. CIG contends that NGPA sections 102 and 103 prices are available for deep new gas because NGPA section 101(b)(5)[42] provides:

> If any natural gas qualifies under more than one provision of this title, providing for any maximum lawful price, or for any exemption for such price, with respect to any first sale of natural gas, the provision which could result in the highest prices shall be applicable.

Because "deep gas" fits the criteria of NGPA sections 102 and 103, CIG asserts that after November 1, 1979, it was entitled to collect the maximum lawful prices for deep gas under those sections. On the other hand CIG's customers argue that even if the agreement authorized NGPA incentive prices, the deregulation clause of the agreement governs as to deep new gas, as of November 1, 1979.

In the initial decision the judge concluded that: The question is what reasonable provision would the

---

[41] 15 U.S.C. § 3331(b) (1982).

[42] 15 U.S.C. § 3311(b)(5) (1982).

> parties have made in 1973 if they had anticipated a situation where gas qualifies for more than one incentive price and it later only qualifies for one. On the basis of how the parties treated the possibility of oil reserves being discovered, it is concluded that they would have continued to apply any incentive price for which the gas qualified and that the incentive portion of the price would be shared in accord with the respective contributions to the Program Fund.[43]

Because we have concluded that the settlement authorized NGPA prices, the judge's decision cannot stand.

In FERC v. Martin Exploration Management Co.[44] the Supreme Court upheld Order No. 406[45] wherein the Commission held that natural gas which qualified for both regulated and deregulated treatment under the NGPA would be treated as deregulated gas. Although Order No. 406 was primarily concerned with gas qualified under NGPA sections 107(c)(5) and 108, it nevertheless applies to the issue before us. In this case deep gas that qualified under 107(c)(1) was deregulated on November 1, 1979. Thus as of that date, the deregulated price in the agreement governs, and CIG was not entitled to collect the NGPA sections 102 and 103 prices after that date. Since the annual escalation of 1.5¢ per Mcf under the agreement is less than the escalation provided under NGPA sections 102 and 103, CIG must refund the excess amount it has collected for the deep gas.

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[43] 32 FERC at p. 65,132.

[44] 56 U.S.L.W. 4458 (U.S. May 31, 1988) (Nos. 87-363 and 364).

[45] Deregulation and other Pricing changes on January 1, 1985, under the Natural Gas Policy Act, *FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶ 30,614 (1984); Order on reh'g, ¶ 30,622 (1984) (Order No. 406-A). Order No. 406 is codified in 18 C.F.R. § 270.208 (1987).

D. Miscellaneous

With respect to the other issues, the judge ruled that CIG had acted properly in administering and terminating the program except for the valuation of undeveloped leases acquired with Program funds. These leases, he held, should have been valued at their fair market value when transferred back to CIG, not at book value as CIG had valued them. He also held that the fair market value of these leases should be determined either by agreement or through further proceeding. We affirm the judge on these rulings.

V. Summary

Under our decision CIG is entitled to collect certain NGPA incentive prices. However, we are affirming the initial decision on the "tight sands" issue, and the undeveloped lease valuation, which impose a refund obligation upon CIG. Similarly, GIC must refund the excess amount it collected for the section 107(c)(1) "deep gas." Accordingly, we shall order CIG to file a report within 45 days of the date of this order, setting forth the amount of repayment due including interest, and the proposed repayment plan.

The Commission orders:

(A) The initial decision is affirmed and adopted in part and reversed in part in accordance with this opinion and order.

(B) Within 45 days of the date of this order, CIG shall file the report required.

(C) All exceptions not granted are denied.

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
NOV 15 1995
OFFICE OF THE CLERK

No. 95-414

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

CIG EXPLORATION, INC.,
Petitioner,

v.

UTAH STATE TAX COMMISSION, et. al.,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of Utah

BRIEF OF RESPONDENT UTAH STATE TAX COMMISSION

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November 14, 1995

BEST AVAILABLE COPY

QUESTION PRESENTED

Did the Utah Supreme Court properly apply state law and rule that Petitioner's ad valorem taxes were not "erroneously or illegally collected" within the meaning of Utah Code Ann. § 59-2-1321 because the taxes were based on the fair market value of its property determined by what a willing buyer and seller would pay on January 1 each year from 1981 to 1986, viewed retrospectively, and was correct for each of the years at issue despite a FERC order in 1989?

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JURISDICTION

The original judgment of the Utah Supreme Court was entered March 7, 1995. CIG Exploration Inc. petitioned for rehearing, but the Court denied the petition and issued an amended opinion on June 14, 1995. This Court does not retain jurisdiction since the issue is one of state law. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Utah Constitution, Article XIII Section 2 (1);
Utah Code Ann. § 59-2-1321 (Supp. 1991);
Utah Code Ann. § 59-2-103(1) (Supp. 1991);
Utah Code Ann. § 59-2-102(6) (Supp. 1991);
Utah Code Ann. § 59-2-201(1)(e) (Supp. 1991);
Utah Code Ann. § 78-12-26(3) & (4) (1987).

STATEMENT OF THE CASE

A. Factual Background.

Petitioner CIG Exploration, Inc. ("Exploration") is a subsidiary of Colorado Interstate Gas Company ("CIG"), an interstate gas pipeline. In 1973, Exploration, CIG, and CIG's customers entered into a stipulation and agreement ("the stipulation") which, among other things, set forth a formula for calculating the price at which Exploration would provide natural gas services. In 1982, the Public Service Company of Colorado ("PSC"), a CIG customer and a party to the stipulation, filed a claim with the Federal Energy Regulatory Commission ("FERC"), asserting that Exploration had overcharged its customers for natural gas services in violation of the stipulation's pricing terms. After six years of litigation,

FERC sustained the PSC's allegations and ordered Exploration to refund approximately $ 89,000,000 to its customers.

From 1981 to 1986, Exploration owned and paid property taxes on natural gas wells located in Uintah County, Utah. The fair market value of these wells was fixed on January 1 of each year by the Utah State Tax Commission ("Commission") in accordance with Utah Code Ann. § 59-2-201(1)(e) and Commission rule R884-10P-1(B)(4). That rule provided, "The taxable value of the underground gas rights shall be 400 percent of the proceeds from the sale of gas production from each such property during the calendar year prior to the date of assessment . . . ." Exploration never challenged the assessments nor presented to the Commission any other valuation method reasonably determinative of the fair market value of its mining property.

B. Proceedings Below.

In 1989, shortly after FERC determined that Exploration had charged more for gas produced from, inter alia, the Uintah County wells than it was entitled to charge under the stipulation, Exploration submitted a request to the Uintah County Commission for a refund of approximately $1,450,000. The refund related to ad valorem taxes paid on its wells from 1981 to 1986. In its request for a tax refund, Exploration claimed that the FERC order directing Exploration to return a portion of its gas-sale proceeds effectively reduced Exploration's net revenues from the Uintah County wells for each of the years 1980 through 1985. Although the Commission's valuations of the Uintah County property for the years 1981 through 1986 were based upon an accurate measure of Exploration's gas-sale proceeds known on or before the assessment date, January 1 from 1981 to 1986, Exploration

claimed that it was entitled to a refund or a recoupment of ad valorem taxes paid based on a recalculation of its assessed value under the 1989 FERC order.

On July 5, 1991, after the County had denied Exploration's request for a tax refund, Exploration filed an action in state district court, seeking recovery of the ad valorem taxes based on information that did not exist 8 years earlier when the property was valued. Exploration grounded its complaint on section 59-2-1321 of the Code, which entitles taxpayers to a refund of property taxes which have been "erroneously or illegally collected." Utah Code Ann. § 59-2-1321. The district court granted summary judgment against Exploration, concluding that (I) Exploration's claim was barred by either of the potentially relevant statutes of limitations, Utah Code Ann. § 78-12-26(3), (4); and (ii) even if Exploration's claim was not time-barred, Exploration could not recover under section 59-2-1321 because that section "is concerned with cases in illegal assessment or collection involving factors where the error could objectively be determined at the time of the [assessment or collection]." App. 15a.

Exploration appealed the decision of the district court to the Utah Supreme Court. On March 7, 1995, the Utah Supreme Court issued an opinion affirming the decision of the lower court. Exploration filed a Petition for Rehearing on March 22, 1995. In its Petition, Exploration argued that the court's decision was in direct conflict with *Reich v. Collins*, 115 S.Ct. 547 (1994) claiming that under *Reich*, subsequent events can render an initial assessment "erroneous or illegal".

On June 14, 1995, the Utah Supreme Court denied the petition for rehearing and issued an amended decision affirming the district court. App. 4a-12a. Without ruling on whether

Exploration's claim was barred by applicable statutes of limitation, the court held that the taxes which Exploration sought to have refunded were not "erroneous or illegally collected" within the meaning of Utah Code Ann. § 59-2-1321. App. 12a. Reviewing the Utah statutory scheme for property taxation, the court held that the value of property is determined on January 1st, *viewed retrospectively*. (emphasis original). App. 10a. That is, a taxpayer is not entitled to a refund of taxes which were paid on the basis of valuation that was correct as of a given January 1st but which would have been different had the assessor known of a subsequent state of facts. *Id.* In a footnote, the Court further explained that its analysis was not affected by *Reich v. Collins* because the ad valorem taxes on Exploration were correct when they were assessed and facts occurring after the collection of the tax did not make that tax collection "erroneous". App. 11a. The Court noted that the average taxpayer reading section 59-2-1321 in conjunction with the rest of the Property Tax Act would *not* conclude that [Exploration] was entitled to a refund. *Id.*

REASONS FOR DENYING THE WRIT

Whether county government should be forced to refund lawfully collected property taxes is not an issue that merits the attention of this Court. The issue does not present a question of federal law nor has it divided the federal circuits or the state appellate courts. Moreover, there is a strong federal policy of comity and noninterference with state tax administration. This policy, embodied in the State Tax Injunction Act, 28 U.S.C.A. § 1341, divests federal courts of subject matter jurisdiction on tax matters where there is a "plain, speedy and efficient" remedy in state court. Exploration availed itself of such a remedy. This Court should not review the Utah Supreme Court decision because it properly applies state law.

I. EXPLORATION'S REQUEST FOR TAX REFUNDS PRESENTS A QUESTION OF STATE LAW.

After the district court ruled against Exploration, it sought review before the Utah Supreme Court. In its Petition for review, Exploration asked the court to construe the phrase "erroneously or illegally collected" under Utah Code Ann. § 59-2-1321 to include its request for property tax refunds based on a recalculation of its assessed value under the 1989 FERC order.

Under Utah law, section 59-2-1321 provides a remedy for unlawful property tax assessments and collections. It directs county legislative bodies to refund property taxes that have been erroneously or illegally collected. "Any taxes, interest, and costs paid more than once, *or erroneously or illegally collected*, may, by order of the county legislative body, be refunded by the county treasurer . . .". *Id.* (emphasis added).

By its plain language, this statute gives county legislative bodies authority to grant refunds for property taxes "erroneously or illegally collected". The issue raised below was whether the 1989 FERC order directing Exploration to refund a portion of its gas-sale proceeds for overcharging customers in earlier years rendered otherwise lawfully collected property taxes erroneous or illegal. The Court applied state law to conclude that the property taxes had been lawfully collected and Exploration was not entitled to a refund. App. 12a.

A. LAWFULLY COLLECTED PROPERTY TAXES ARE NOT SUBJECT TO REFUND.

In its decision below, the court construed the Utah Property Tax Act. Utah Code Ann. §§ 59-2-101 et seq. Under Utah law, all property is taxed on the basis of fair market value as of January 1 (lien date). Utah Code Ann. § 59-2-103(1); *See also*, Utah Constitution, Article XIII Section 2 (1). Fair market value is the amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell *and both having reasonable knowledge of the relevant facts* . . .. Utah Code Ann. § 59-1-102(6) (emphasis added).

The Utah statutory scheme of property assessment requires that the Commission determine fair market value on January 1st of each year. Utah Code Ann. § 59-2-201(1)(e) provides

> (1) By May 1 of each year the following property, unless otherwise exempt under the Utah Constitution or under Part 11 of this chapter, shall be assessed by the commission at 100% of fair market value, *as valued on January 1*, in accordance with this chapter:
>
> ******
>
> (e) all mines and mining claims . . . .

(emphasis added). Accordingly, fair market value is determined by the facts known to the buyer and seller as of January 1st, *viewed retrospectively*. App. 12a. *See also*, Affidavit of D. Brent Eyre, App. 17a-19a. (Record below pp.

341-348). Thus, according to Utah law, the phrase "erroneously or illegally collected" does not include ad valorem taxes paid on the basis of a valuation which was correct as of the time it was made and collected. App. 10a. Moreover, the assessor's determination of fair market value is presumed correct unless the taxpayer challenges the assessment and proves otherwise. *Utah Power & Light Co. v. State Tax Comm'n*, 590 P.2d 332 (Utah 1979); *Hercules Inc. v. Utah State Tax Com'n*, 877 P.2d 169 (Utah App. 1994). Upon judicial review, deference is given to the trier of fact's determination of value based on substantial evidence. Utah Code Ann. § 63-46b-16(4)(g)(1989).

By applying state law to Exploration's challenge, the 1989 FERC decision ordering Exploration to refund gas-sale proceeds for overcharging its customers becomes irrelevant. This subsequent factual event did not affect the earlier assessments which were correct based on existing information. Exploration was not entitled to a refund because the tax valuation looks solely at information existing on January 1 of each year. Thus, Exploration's property taxes were not "erroneously or illegally collected". App. 12a.

B. EXPLORATION'S CLAIM IS BARRED BY APPLICABLE STATUTES OF LIMITATION.

Utah law provides a three year statute of limitations for a cause of action grounded in fraud or mistake. Utah Code Ann. § 78-12-26(3) (1992). A three year limit also applies to actions for liability created by statute. Utah Code Ann. § 78-12-26(4) (1992). Exploration's claim falls within the scope of both of these statutes because it is based on an alleged "mistake" or "error" and because it alleged a liability based on

statute. This issue was decided below by the district court against Exploration. It was also raised but not decided by the Utah Supreme Court. Because Exploration's claim for refunds were not timely filed, they are barred by state law.

II. FOR THE FIRST TIME ON APPEAL, EXPLORATION CLAIMS FEDERAL PREEMPTION.

Exploration claims that the Utah Supreme Court "fail[ed] to give any effect to provisions in the FERC Order that it had the right to seek tax refunds" thereby "refus[ing] to give adequate consideration to the 'federal interest'" in violation of the Supremacy Clause. Petitioner's Brief, p. 8. These claims and the issue framed by Exploration for this Court were never raised or discussed below at any time. Exploration seeks for the first time on appeal to raise a new issue in an attempt to make a "federal issue" of a straightforward question of state law.

It is inaccurate to claim that the State court "ignored" or "refused to consider" an issue that was never presented. At no time below did Exploration ever ask the court to review the FERC Order Approving Settlement with Modification or the Settlement itself, or consider a claim of federal preemption. Ordinarily, this court will not hear issues raised for the first time on appeal. *Taylor v. Freeland & Kronz*, 503 U.S. ___, 118 L.Ed. 2d 280 (1992) citing *Youakim v. Miller*, 425 U.S. 231 (1976). Thus, the Petition should be denied.

III. EXPLORATION MISCHARACTERIZES THE NATURE OF THE FERC'S SETTLEMENT ORDER.

In an effort to create a federal interest conflict where none exists, Exploration mischaracterizes the nature of the FERC Order Approving Settlement With Modifications ("Settlement Order") and its application to this dispute. The Settlement Order does not mandate cost recoveries. Rather, it ratifies a negotiated settlement between Exploration and its customers. App. 20a-29a.

FERC Opinion Nos. 306 and 306-A required Exploration to refund a minimum principal amount of monies to its customers for overcharging them. They did not, however, require Exploration to recover or to seek recovery of excess payments made to other producers (Third Party Excess Payments) or taxes, royalties and other costs related to the excess payments (Related Costs). Rather, Exploration and its customers agreed among themselves that "[Exploration] [would have] the right to *seek* recovery of and retain Third Party Excess Payments and Related Costs from those persons or entities in receipt of same." (emphasis added). App. 35a. Implicitly recognizing that Exploration might not ultimately recover such costs, the parties also agreed that should Related Costs be recovered, they could be retained by Exploration and not shared with its customers. *Id.*

Exploration presented its negotiated settlement to FERC. In the Settlement Order, the FERC stated:

> (A) The offer of settlement filed on March 13, 1989, in these proceedings is approved as modified by this order.

> (B) *The Commission's approval* of this settlement as modified by this order *does not constitute approval of, or precedent, regarding any principle or issues in these proceedings.*

(emphasis added). App. 29a. FERC expressly disclaimed "approval of, or precedent regarding any principle or issues in these proceedings," which included the right to seek recovery of related costs. The FERC's express disclaimer coupled with the fact that Exploration negotiated with its customers for the right to seek recovery of related costs eliminate any claim that the property tax refunds sought by Exploration were "federally mandated cost recoveries". Petitioner's Brief, p. 8. The FERC Settlement Order does not raise any federal interest conflicts or preemption issues warranting review by this Court.

The negotiated settlement between Exploration and its customers reserved for Exploration the right to *seek* recovery of *related costs*. It did not reserve the right to *recover* those costs. Neither Utah nor Uintah County were parties to the settlement or bound by its terms. Moreover, property taxes are not *related costs* in the sense that such costs are directly related to Exploration's excess payments. Unlike an income tax or a gross receipts tax which are tied directly to financial accounting numbers and subject to amendment, property taxes are based on fair market value. Fair market value is only an estimate of what the property would sell for between a willing buyer and seller on a specific day when each has knowledge of the relevant facts. Utah Code Ann. § 59-2-102(8)(19); *Utah Ass'n of Counties v. Tax Comm'n*, 895 P.2d 819, 825 (Utah 1995). There are a variety of methods for estimating this value, including the cost, income (similar to that used by the Commission under rule R884-10P-1(B)(4)) and market approaches. *See, Rio Algom Corp. v. San Juan County*, 681

P.2d 184, 189 (Utah 1984); *Uintah Oil Assoc. v. County Bd. of Equalization*, 853 P.2d 894, 896 (Utah 1993); and *Questar Pipeline Co. v. Utah State Tax Comm'n*, 850 P.2d 1175 (Utah 1993). Regardless of the method, the determination is based on facts known or knowable on the assessment date and will not be affected by unknown future facts.

IV. THE PETITION SHOULD BE DENIED BASED ON A FEDERAL POLICY OF COMITY AND NONINTERFERENCE WITH STATE TAX ADMINISTRATION.

Exploration has never been denied the right to *seek* property tax refunds. Whether Exploration is entitled to recover refunds, however, must be decided by applying state law, i.e., Utah Code Ann. § 59-2-1321. FERC could not have ratified a provision ordering Uintah County to refund property taxes because Uintah County was not a party to the FERC proceedings. Moreover, Exploration could not have pursued its claim for refund in federal court because such a suit would have violated a strong federal policy of comity and noninterference with state tax administration. *Franchise Tax Bd. v. Alcan*, 493 U.S. 331 (1990). There is a deeply rooted principle of federal equitable jurisdiction which restrains the federal courts from interference with the internal fiscal operations of the states. *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976). This federal policy is codified under the Tax Injunction Act, 28 U.S.C. § 1341 which divests federal courts of subject matter jurisdiction when the remedy in state courts is "plain, speedy and efficient." A state court remedy is "plain, speedy and efficient" if it "provides the taxpayer with a 'full hearing and judicial determination' at which [it] may raise any and all constitutional objections to the tax." *California v. Grace*

Brethren Church, 457 U.S. 393 (1982) quoting *Rosewell v. LaSalle National Bank*, 450 U.S. at 514.

The State does not dispute FERC's "authority to regulate the intricate relationship between the purchasers' cost structures and eventual costs to wholesale customers who sell to consumers in other States." *Maryland v. Louisiana*, 451 U.S. 724, 750 (1981) quoting *Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 92 (1963). Petitioner's Brief, p. 8. In this instance, however, the Settlement Order does not mandate cost recoveries. It merely approves a settlement that grants the parties the right only to seek recovery of related costs. Whether such costs are recoverable rests with the application of state law.

V. EXPLORATION WAS NOT DENIED DUE PROCESS IN SEEKING PROPERTY TAX REFUNDS.

At no time during these proceedings has Exploration ever been denied due process. To the contrary, Utah law provides several procedural safeguards against unlawful exactions which satisfy principles of due process. See, *McKesson Corp. V. Florida Alcohol & Tobacco Div.*, 496 U.S. 18, 36 (1990). For example, Utah Code Ann. § 59-2-1007 provides a predeprivation remedy in that if the owner of any property assessed by the Utah Tax Commission ("Commission") objects to the assessment, they may apply to the commission for a hearing. The Commission must set a time for hearing the objection and render a written decision. *Id.* Exploration did not avail itself of this remedy.

As a postdeprivation remedy, Utah Code Ann. § 59-2-1321 permits refunds for property taxes "erroneously or

illegally collected". This "backward looking relief" applies to all property taxes unlawfully collected and is consistent with the requirements of *McKesson*, 496 U.S. at 31.. The Utah Supreme Court held that section 59-2-1321 "mandates" the return of "erroneously or illegally collected ad valorem taxes." App. 8a. Whether property taxes are "erroneously or illegally collected," however, must be determined case by case after considering facts known to a buyer and seller as of January 1st, view retrospectively. App. 10a. Property taxes that are otherwise properly assessed based on relevant information are not erroneously or illegally collected based on facts arising several years later that were not known or knowable at the time the tax was collected. App. 12a.

A. REICH v. COLLINS DOES NOT CONFLICT WITH THE UTAH DECISION.

Exploration claims that the judgement of the Utah Supreme Court is in direct conflict with *Reich v. Collins*, 115 S. Ct. 547 (1994). In *Reich*, a Georgia taxpayer, sought a refund of state income taxes paid on federal retirement benefits. Georgia's refund statute states, "A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him." *Id.* at 549. Reich argued that the taxes at issue had been "erroneously or illegally assessed and collected" because the law under which the taxes were assessed and collected was subsequently declared unconstitutional. This Court ordered a refund, holding that Georgia violated the Due Process Clause of the Fourteenth Amendment by "[holding] out what plainly appeared to be a 'clear and certain' postdeprivation remedy, in the form of its tax refund statute, and then declar[ing], only after Reich and others had paid the disputed taxes, that no such

remedy exists." *Id.* at 550. In reaching this conclusion, this Court found two factors significant: (1) "[T]he average taxpayer reading this language [Georgia's refund statute] would think it obvious that state taxes assessed in violation of federal law are 'illegally assessed' taxes"; and (2) the Georgia Supreme Court has not placed 'any limiting construction on the statute's sweeping language." *Id.* This Court also noted that the Eleventh Circuit Court of Appeals had previously denied federal court relief to taxpayers raising claims similar to Reich's, in part because it thought Georgia's refund statute applied to the claims. *Id.* (Citing Waldron v. Collins, 788 F.2d 736, 738 cert. denied, 479 U.S. 884 (1986)).

This case is distinguishable from *Reich* because under state law, a plain reading of the Utah Property Tax Act makes clear that taxes paid on the basis of fair market value that was correct as of January 1st are not "illegally or erroneously collected." Thus, the "average taxpayer" reading section 59-2-1321 in conjunction with the rest of the Property Tax Act would not conclude that Exploration was entitled to a refund. Unlike *Reich* which involved a question of federal law (the constitutionality of a tax statute), this case involves a question of fact (the fair market value of Exploration's mining property from 1981 to 1986 determined by the facts known to a buyer and seller as of January 1st, viewed retrospectively). Utah has not "held out what plainly appeared to be a 'clear and certain' postdepreviation remedy" that would have entitled Exploration to a refund. Thus, Exploration's due process rights have not been violated.

CONCLUSION

The issue presented does not merit the attention of this Court. Whether county government should be forced to refund lawfully collected property taxes does not present a question of federal law nor has it divided the federal circuits or the state appellate courts. The issue is one of state law. Moreover, there is a strong federal policy of comity and noninterference with state tax administration. Thus, the petition for certiorari should be denied.

Respectfully submitted,

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Jan Graham
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Salt Lake City, UT 84144
(801) 536-8200
Counsel for State Respondent

November 14, 1995

*Counsel of Record

APPENDICES

APPENDIX A

CONSTITUTIONAL PROVISIONS AND STATUTES

Utah Constitution, Article XIII Section 2 (1):

> (1) All tangible property in the state, not exempt under the laws of the United States, or under this Constitution, shall be taxed at a uniform and equal rate in proportion to its value, to be ascertained as provided by law.

Utah Code Ann. § 59-2-1321 (Supp. 1991):

> The county legislative body, upon sufficient evidence being produced that property has been either erroneously or illegally assessed, may order the county treasurer to allow the taxes on that part of the property erroneously or illegally assessed to be deducted before payment of taxes. Any taxes, interest, and costs paid more than once, or erroneously or illegally collected, may, by order of the county legislative body, be refunded by the county treasurer, and the portion of taxes, interest, and costs paid to the state or any taxing entity shall be refunded to the county, and the appropriate officer shall draw a warrant for that amount in favor of the county.

Utah Code Ann. § 59-2-103(1) (Supp. 1991):

> (1) All tangible taxable property shall be assessed and taxed at a uniform and equal rate

on the basis of its fair market value, as valued on January 1, unless otherwise provided by law.

Utah Code Ann. § 59-2-102(6) (Supp. 1991):

> (6) "Fair market value" means the amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts . . ..

Utah Code Ann. § 59-2-201(1)(e) (Supp. 1991):

> (1) By May 1 of each year the following property, unless otherwise exempt under the Utah Constitution or under Part 11 of this chapter, shall be assessed by the commission at 100% of fair market value, as valued on January 1, in accordance with this chapter:
>
> ******
>
> (e) all mines and mining claims . . ..

Utah Code Ann. § 78-12-26(3) & (4) (1987):

> Within three years [for commencing a civil action]:
>
> (3) An action for relief on the ground of fraud or mistake; except that the cause of action in such case does not accrue until the discovery by the aggrieved party of the facts constitution the fraud or mistake.

(4) An action for a liability created by the statutes of this state, other than for a penalty or forfeiture under the laws of this state, except where in special cases a different limitation is prescribed by the statutes of this state.

APPENDIX B

SUPREME COURT OF UTAH
STATE OF UTAH
SALT LAKE CITY, UTAH

June 14, 1995

OFFICE OF THE CLERK

No. 940172
910800160

CIG EXPLORATION, INC.
Plaintiff and Appellant

v.

UTAH STATE TAX COMMISSION, UINTAH COUNTY, GLEN MCKEE, LORRIN MERRELL, MAX ADAMS, UINTAH COUNTY COMMISSIONERS, and DONNA RICHENS, UINTAH COUNTY TREASURER,
Defendants and Appellees.

The petition for rehearing is denied. Enclosed is a copy of the amended opinion that was issued in this matter.

GEOFFREY J. BUTLER
CLERK

APPENDIX C

[Filed June 14, 1995]

IN THE SUPREME COURT OF THE STATE OF UTAH

No. 940172

CIG EXPLORATION, INC.,
Plaintiff and Appellant,

v.

UTAH STATE TAX COMMISSION; UINTAH COUNTY; GLEN MCKEE, LORRIN MERRELL, AND MAX ADAMS, Uintah County Commissioners; and DONNA RICHENS, Uintah County Treasurer,
Defendants and Appellees.

Eighth District, Uintah County
The Honorable John R. Anderson

AMENDED OPINION

ZIMMERMAN, Chief Justice:

CIG Exploration, Inc. ("Exploration"), appeals from the district court's grant of summary judgment, dismissing Exploration's claim for a refund of allegedly overpaid ad valorem taxes for the years 1981 through 1986. Before the district court, Exploration argued that it was entitled to a refund of taxes paid on the basis of valuations of its natural gas wells in Uintah County which, though correct as of January 1st of each relevant year, would have been lower under a subsequent state of affairs. The district court concluded that (i) Exploration's claim was barred by the statute of limitations, and (ii) even if Exploration's claim was not time-barred, Exploration was not entitled to a refund because the alleged valuation error could not have been discovered until after the taxes were collected. We affirm.

The material facts in this case are not disputed. Exploration is a subsidiary of Colorado Interstate Gas Company ("CIG"), an interstate gas pipeline. In 1973, Exploration, CIG, and CIG's customers entered into a stipulation and agreement ("the stipulation") which, among other things, set forth a formula for calculating the price at which Exploration would provide natural gas services. In 1982, the Public Service Company of Colorado ("PSC"), a CIG customer and a party to the stipulation, filed a claim with the Federal Energy Regulatory Commission ("FERC"), asserting that Exploration had overcharged its customers for natural gas services in violation of the stipulation's pricing terms. After six years of litigation, FERC sustained PSC's allegations and ordered Exploration to refund approximately $89,000,000 to its customers.

From 1981 to 1986, Exploration owned and paid

property taxes on natural gas wells located in Uintah County, Utah. The taxable value of these wells was fixed each year by the Utah State Tax Commission ("Commission") in accordance with the Commission's rule R884-10P-1(B)(4). That rule provided, "The taxable value of the underground gas rights shall be 400 percent of the proceeds from the sale of gas production from each such property during the calendar year prior to the date of assessment . . . ."

In 1989, shortly after FERC determined that Exploration had charged more for gas produced from, inter alia, the Uintah County wells than it was entitled to charge under the stipulation, Exploration submitted a request to the Uintah County Commission for a refund of approximately $1,450,000 in ad valorem taxes paid on its well from 1981 to 1986. In its request for a tax refund, Exploration claimed that the FERC order directing Exploration to return a portion of its gas-sale proceeds effectively reduced Exploration's net revenues from the Uintah County wells for each of the years 1980 through 1985. Because the Commission's valuations of the Uintah County property for the years 1981 through 1986 were based upon what turned out to be an inaccurate measure of Exploration's gas-sale proceeds from these wells, Exploration claimed that it was "entitled to a refund or a recoupment of ad valorem taxes paid."

On July 5, 1991, after the County had denied Exploration's request for a tax refund, Exploration filed this action in district court, seeking recovery of the allegedly overpaid ad valorem taxes. Exploration grounded its complaint on section 59-2-1321 of the Code, which entitles taxpayers to a refund of taxes which have been "erroneously or illegally collected." Utah Code Ann. § 59-2-1321. The district court granted summary judgment against Exploration, concluding

that (i) Exploration's claim was barred by either of the potentially relevant statutes of limitations, Utah Code Ann. § 78-12-26(3), (4); and (ii) even if Exploration's claim was not time-barred, Exploration could not recover under section 59-2-1321 that section "is concerned with cases in illegal assessment or collection involving factors where the error could objectively be determined at the time of the [assessment or collection]." Exploration appeals, challenging the district court's legal conclusions.

We first state the applicable standard of review. Summary judgment is appropriate only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Utah R.Civ.P. 56(c); *Higgins v. Salt Lake County*, 855 P.2d 231, 235 (Utah 1993). "When there are disputed issues of material fact, a challenge to summary judgment presents only a question of law, which we review for correctness." *West v. Thomson Newspapers*, 872 P.2d 999, 1004 (Utah 1994) (citations omitted); *accord Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 920 (Utah 1993).

Because we find the issue dispositive, we address only the question of whether section 59-2-1321 provides a vehicle by which Exploration can recover its allegedly overpaid ad valorem taxes. Section 59-2-1321 provides in relevant part, "Any taxes . . . erroneously or illegally collected, may, by order of the county legislative body, be refunded by the country treasurer." Utah Code Ann. § 59-2-1321. We have held that this language mandates that countries refund erroneously or illegally collected ad valorem taxes. *Utah Parks Co. v. Iron County*, 380 P.2d 924, 926 (Utah 1963) (citing *Neilson v. San*

Pete County, 133 P. 334 (Utah 1912)).[1] Therefore, the determinative issue in this case is whether the taxes of which Exploration seeks a refund were erroneously or illegally collected within the meaning of section 59-2-1321. We conclude that they were not.

Initially, we must determine what constitutes erroneously or illegally collected taxes. When faced with a question of statutory construction, we look first to the plain language of the statute. *State v. Larsen*, 865 P.2d 1356, 1357 (Utah 1993); *Schurtz v. BMW of N. Am. Inc.*, 814 P.2d 1108, 1112 (Utah 1991). Only if we find some ambiguity need we look further. *Schurtz*, 814 P.2d at 1112; *accord World Peace Movement of Am. v. Newspaper Agency Corp.*, 879 P.2d 253, 259 (Utah 1994) ("Only when we find ambiguity in the statute's plain language need we seek guidance from the legislative history and relevant policy considerations."); *see also Beynon v. St. George-Dixie Lodge* #1743, *Benevolent & Protective Order of Elks*, 854 P.2d 513, 518 (Utah 1993) ("If doubt or uncertainty exists as to the meaning or application of an act's provisions, the court should analyze the act in its entirety and 'harmonize its provisions in accordance with the legislative intent and purpose.'" (quoting *Osuala v. Aetna Life & Casualty*, 608 P.2d 242, 243 (Utah 1980))). Applying these principles, the district court concluded that the term "erroneously or illegally collected" does not include ad valorem taxes paid on the basis of a valuation which was correct as of

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[1] Although both *Utah Parks Co. v. Iron County*, 380 P.2d 924 (Utah 1963), and *Neilson v. San Pete County*, 123 P.334 (Utah 1912), relied on the predecessor to section 59-2-1321, the statutory language at issue in this case has not changed in any material respect since *Utah Parks* and *Neilson* were decided.

the time it was made but which is later alleged to have been erroneous due to factors not existing at the time of the valuation. We agree.

The Code does not define the term "erroneously or illegally collected." We therefore consider the term in light of the entire Property Tax Act, Utah Code Ann. §§ 59-2-101 to -1372. The statutory scheme of property assessment revolves around January 1st of each year, the valuation date. Specifically, section 59-2-201(1), under which the Uintah County property in question was assessed, provides in relevant part:

> (1) By May 1 of each year the following property shall be assessed by the commission at 100% of fair market value, *as valued on January 1,* in accordance with this chapter:
>
> . . . ;
>
> (e) all mines and mining claims . . . .

Utah Code Ann. § 59-2-201(1) (emphasis added). The Property Tax Act's definition of "mine" encompasses the Uintah County property. *See* Utah Code Ann. § 59-2-102(14), (16). We think that under the plain import of this language, the determinative question is the value as of January 1st, *viewed retrospectively.* This leaves no room for us to hold that a taxpayer is entitled to a refund of taxes which were paid on the basis of a valuation that was correct as of a given January 1st but which would have been different had the assessor known of a subsequent state of facts.

Our conclusion that Exploration is not entitled to a refund under section 59-2-1321 as a result of the FERC order is supported by our decision in *Shea v. State Tax Commission,*

120 P.2d 274 (Utah 1941). In that case the plaintiff sought to recover diesel fuel taxes paid without protest pursuant to a statute later held to be unconstitutional. The plaintiff argued that he was entitled to a refund under a statute providing that "[w]henever the [state tax commission] through error collects any fee not required to be paid hereunder the same shall be refunded to the person paying the same." Act of March 10, 1937, ch. 65, § 149, 1937 Utah Laws 138. Rejecting the plaintiff's contention that any collection under a statute later declared unconstitutional is a collection "through error," we interpreted the statute authorizing a refund as applying only "to collections, which the officials could themselves have determined at the time of collection that they should not collect." *Shea*, 120 P.2d at 276. Under *Shea*, as under our decision today, events occurring subsequent to the collection of the tax did not render the collection erroneous, entitling the taxpayer to a refund.[2]

2

Our analysis is not affected by the United States Supreme Court's recent decision in *Reich v. Collins*, 115 S.Ct. 547 (1994). Reich, a Georgia taxpayer, sought a refund of state income taxes paid on federal retirement benefits. Georgia's refund statute reads in pertinent part, "A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him." *Id.* at 549. Reich argued that the taxes at issue had been "erroneously or illegally assessed and collected" because the law under which the taxes were assessed and collected was subsequently declared unconstitutional. The Supreme Court ordered a refund, holding that Georgia violated the Due Process Clause of the Fourteenth Amendment by "[holding] out what plainly appeared to be a 'clear and certain' post-deprivation remedy, in the form of its tax refund statute, and then declar[ing], only after Reich and others had paid the disputed taxes, that no such remedy exists." *Id.* at 550. In reaching this conclusion, the Supreme Court found two factors significant: (i) "[T]he average taxpayer reading this language [Georgia's refund statute] would think it obvious that state taxes assessed in violation

For the foregoing reasons, we hold that the taxes of which Exploration seeks a refund were not "erroneously or illegally collected" within the meaning of section 59-2-1321. Accordingly, we affirm.

WE CONCUR:

RICHARD G. HOWE
CHRISTINE M. DURHAM
LEONARD M. RUSSON
J. DENNIS FREDERICK

Stewart, Associate Chief Justice having disqualified himself, does not participate herein; Frederick, District Court Judge, sat.

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of federal law are `illegally assessed' taxes"; and (ii) the Georgia Supreme Court has not placed "any limiting construction on the statute's sweeping language." *Id.* The Court also noted that the Eleventh Circuit Court of Appeals had previously denied federal court relief to taxpayers raising claims similar to Reich's, in part because it thought Georgia's refund statute applied to the claims. *Id.* (citing *Waldron v. Collins*, 788 F.2d 736, 738, *cert. denied*, 479 U.S. 884 (1986)).

The instant case is distinguishable from *Reich*. First, as we stated above, a plain reading of the Property Tax Act makes clear that taxes paid on the basis of a valuation that was correct as of January 1st are not "illegally or erroneously collected." Therefore, the "average taxpayer" reading section 59-2-1321 in conjunction with the rest of the Property Tax Act would not conclude that CIG is entitled to a refund. Second, although we have not previously placed a limiting construction on section 59-3-1321, this court held long ago that events occurring subsequent to the collection of a tax do not render the collection erroneous. *See Shea v. State Tax Comm'n*, 120 P.2d 274, 276 (Utah 1941). Therefore, Utah has not "held out what plainly appeared to be a `clear and certain' post deprivation remedy" that would have entitled CIG to a refund. *Reich*, _____ U.S. at _ ___, 115 S.Ct. At 550. Accordingly, we conclude that CIG's due process rights have not been violated in this case.

APPENDIX D

EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR UINTAH COUNTY, STATE OF UTAH
VERNAL DEPARTMENT

Case No. 910800160

CIG EXPLORATION, INC.,

Plaintiff,

vs.

UTAH STATE TAX COMMISSION, UINTAH COUNTY, GLEN MCKEE, LORRIN MERRELL, MAX ADAMS, UINTAH COUNTY COMMISSIONERS, and DONNA RICHENS, UINTAH COUNTY TREASURER,

Defendant.

DECISION AND ORDER

This matter was before the Court on Plaintiff's Motion for Partial Summary Judgment and on Defendant's Motion for Summary Judgment. Argument on the Motions was held on February 22, 1994. Plaintiff, CIG Exploration, Inc., was represented by Maxwell A. Miller and Debra K. Broussard. The Uintah County Defendants were represented by JoAnn B. Stringham and Bill Thomas Peters. The Utah State Tax

Commission was represented by Kelly W. Wright.

Prior to the hearing, the Court considered the Memoranda and exhibits filed by the parties. The Court heard arguments and took the matter under advisement. The Court has considered the law and facts relating to the Motions for Summary Judgment. Now being fully advised, the Court renders the following Decision and Order.

The undisputed facts are set forth in the initial Memoranda of the parties and the parties are in agreement that there are no material issues of fact before the Court which would preclude the Court's considering the matters raised on Summary Judgment.

It is conceded by the parties that the Plaintiff was aware that its tight sands pricing policy may have been erroneous as early as 1982.

This Court has previously ruled that the Defendants could raise the issue of latches and statute of limitations bar by allowing amendments to their pleadings and the Court has considered those arguments as raised. This Court rejects the argument of Plaintiff that there is simply no statute of limitations. The Court concludes that whether U.C.A. Section 78-12-26(3) or (4) is the applicable statute of limitations Plaintiff's claims are time barred. Because the CIG Exploration Plaintiff was on notice as early as 1982 that prices charged may have been erroneous, they could have taken action under the Utah Tax Statutes to cover or protect itself for each of the years in question. It cannot be argued that this was not also the discovery date under the "mistake or fraud" statute. This Court holds that the Statute began to run for each of the years in question as early as 1982 but at the very least at the

latest tax year of 1986. Therefore, because CIG Exploration did not file this action until 1991, more than four years after the last tax payment, CIG Exploration's claims are barred by the Statute of Limitations.

Even if Plaintiff's claim was not barred by the appropriate Statute of Limitations, this Court is of the opinion that U.C.A. Section 59-2-1321, as it has been construed by the Utah Supreme Court, would not provide the "look backward" relief that Plaintiff argues.

This Court is of the opinion that U.C.A. Section 59-2-1321 can't be construed to apply where the issue is valuation. Plaintiff cites *Utah Parks and Atlantic Richfield, infra,* cases as authority for the Court's assumption of jurisdiction to determine tax payer relief where a tax has been erroneously or illegally collected. This Court agrees, but limits the holding of those cases to just such instances. This Court is of the opinion that to allow a backward look at valuation errors would open a myriad of problems with which the Tax Commission nor the Court system could deal. Utah Code Annotated Section 59-2-1321 is concerned with cases in illegal assessment or collection involving factors where the error could objectively be determined at the time of the event. Under a plain reading of the statute and as interpreted by *Shea vs. State Tax Commission,* 120 P.2d 274, 275 (Utah 1941), the vehicle for relief has to be based on objective factors that could have been determined at the time of the event and clearly not with subsequent factors which may or may not affect value.

Atlantic Richfield Company vs. Board of County Commissioners, 569 P.2d 1267 (WY 1977) has to do with the determination of properties which by their nature were later determined to be exempt. It had nothing to do with the

subjective concept of value. *Utah Parks Company vs. Iron County,* 14 Utah 2d 178, 380 P.2d 924 (1963) dealt with the same concept. This Court believes that the *Utah Parks* case stands for the proposition that the Statute providing the relief does grant the Court jurisdiction to correct a mistake or an illegal tax where the illegality or incorrect assessment could be determined at the time of the event. Since the statutory scheme in Utah provides for administrative remedies where there is a problem with valuations, this Court cannot interpret U.C.A. Section 59-2-1321 to vest this Court with jurisdiction to provide relief where there has been in fact a misdetermination of value.

Based upon the above and foregoing conclusions and analysis, it is the opinion of this Court that the Defendants' Motion for Summary Judgment should be granted and Plaintiff's claim should be and is dismissed.

Counsel for Defendants are directed to prepare Judgment of Dismissal.

DATED this 28th day of February, 1994.

BY THE COURT

/s/ JOHN R. ANDERSON
JOHN R. ANDERSON
DISTRICT COURT JUDGE

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Attorney General
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IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT, IN AND FOR UINTAH COUNTY STATE OF UTAH

CIG EXPLORATION, INC.,	)	
	)	
Plaintiff,	)	AFFIDAVIT OF
	)	D. BRENT EYRE
vs.	)	
	)	
UTAH STATE TAX	)	Case No. 910800160
COMMISSION, UINTAH	)	
COUNTY, GLEN MCKEE,	)	
LORRIN MERRELL, and MAX	)	Hon. John R. Anderson
ADAMS, Uintah County	)	
Commissioners, and DONNA	)	
RICHENS, Uintah County	)	
Treasurer,	)	
	)	
Defendants.	)	

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

I, D. Brent Eyre, being first duly sworn on oath deposes and says:

1. I am employed by the Utah State Tax Commission. Since 1987, I have held the position of Assistant Director of the Property Tax Division. In that position, I have been responsible for supervising the Division's assessment of all centrally assessed properties including natural gas properties within the state. In that position, I have spent substantially all my time appraising or reviewing appraisals of natural resource properties including natural gas properties.

2. As part of my employment, I have conducted and reviewed numerous appraisals and have taken numerous courses on appraisal practice. In addition I have taught various courses on appraisal practice and theory. My appraisal training and teaching are summarized in my resume which is attached as Exhibit A.

3. I am knowledgeable of proper appraisal practices.

4. I have first hand knowledge of the facts stated herein.

5. The Tax Commission does not collect property taxes.

6. The Tax Commission has the responsibility for determining the fair market value of natural gas properties.

7. Under recognized appraisal practices and theory,

a fair market value determination is an estimate, at a particular point in time, of the amount at which a reasonable seller and a reasonable buyer would exchange property. It is assumed that the buyer and seller have a reasonable knowledge of the relevant facts at the time of the valuation.

8. Since a fair market value determination is an estimate of market perceptions at a particular point in time, events after that point in time do not affect the fair market value estimate.

9. As a matter of appraisal practice, an assessor should not rely on events following the assessment date in estimating fair market value.

10. The Rule did not contemplate nor was it interpreted by the Tax Commission or the Property Tax Division to permit changes in valuations based on adjustments to sales proceed for events after the assessment date. Applying the Rule in this matter would not be consistent with any recognized method of appraising and would compromise the goal of estimating value as of a specific date. It would only coincidentally estimate fair market value accurately.

DATED this 7th day of December, 1993.

/s/ D. Brent Eyre

Subscribed and sworn to before me this 7th day of December, 1993.

/s/ Sheri J. McFall, Notary Public
Residing at Salt Lake County Utah
My Commission Expires: 02/28/97

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners:

Martha O. Hesse, Chairman;
Charles G. Stalon, Charles A. Trabandt
Elizabeth Anne Moler and Jerry J. Langdon.

Docket No. CP73-184-005

COLORADO INTERSTATE COMPANY, a Division of
Colorado Interstate Company

Docket No. C173-485-004

CIG EXPLORATION, INC.

ORDER APPROVING SETTLEMENT WITH MODIFICATIONS
(Issued August 1, 1989)

On March 13, 1989, Colorado Interstate Gas Company (CIG), CIG Exploration, Inc. (CIGE), Public Service Company of Colorado, Western Gas Supply Company, and Cheyenne Light, Fuel and Power Company (Public Service), the Public Utility Commission of the State of Colorado, The City and County of Denver, and The City of Colorado Springs filed an offer of settlement in these proceedings.

On April 3, 1989 initial comments in support of the settlement were filed by the parties which filed the offer of settlement. Comments were also filed by the Commission Staff (Staff) which did not oppose the settlement but expressed certain concerns, and Natural Gas Pipeline Company of America (Natural) which urged the approval of the settlement with a proposed modification. On April 13, 1989, CIG, CIGE, and Public Service filed joint reply comments and Natural filed reply comments.

For the reasons discussed below, the offer of settlement as modified herein is found to be in the public interest and is approved.

BACKGROUND

On January 7, 1974, the Commission approved a settlement agreement filed in 1973 which authorized CIG and its affiliate CIGE to establish a Gas Search Program.[1] The 1973 settlement required $50.9 million to be spent for this exploration and development program. The funding for the program was to come from higher applicable area rates rather than cost of service rates for CIG's company owned production from existing leases which were transferred to CIGE.

On March 30, 1984, the Commission established a hearing following an offer of settlement filed on March 11, 1983 regarding the final accounting of the Gas Search Program Fund (Program Fund).[3] Among the issues set for hearing were

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[1] *Colorado Interstate Co.*, 51 FPC 74 (1974).

[3] 26 FERC ¶ 61,422.

whether the 1973 settlement authorized CIG to pay Natural Gas Policy Act of 1978 (NGPA) maximum lawful prices for "new gas" developed under the program and whether CIG's final accounting and report filed August 25, 1981, was incorrect.

Following an evidentiary hearing an initial decision was issued on July 24, 1984.[1] In Opinion Nos. 306[2] and 306-A[3], the Commission affirmed in part and reversed in part the initial decision. The Commission found, *inter alia,* that the 1973 settlement permitted the collection of certain NGPA incentive prices for "new gas" but not tight sands pricing under section 107(c)(5) and provided a fixed rate of escalation for price deregulated section 107(c)(1) deep gas. Further, the Commission found that undeveloped leases acquired with program funds when transferred to a non-fund account at the end of the program should have been valued at their fair market value rather than book value. CIG was required to refund the amounts collected in excess of that allowed by 1973 settlement with interest.

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[1]32 FERC ¶ 63,033 (1985).

[2]44 FERC ¶ 61,293 (1988).

[3]45 FERC ¶ 61, 293 (1988).

The Offer of Settlement

The terms of offer of settlement are summarized as follows:

1. Within 10 days of a final Commission order no longer subject to appeal approving the settlement, CIG will refund $44,500,000 to its jurisdictional sales customers based on sales volumes for the period November 1, 1979 to December 31, 1988.

2. CIG will refund an additional $44,500,000 to its jurisdictional sales customers by reducing the non-gas portion of its commodity rates by 28.7 cents per Kcf.

3. CIG will file certain *pro forma* tariff sheets with the Commission after a final Commission order approving the settlement which is no longer subject to appeal. The offer of settlement states that such tariff sheets are anticipated to be in effect for approximately 24 months until the additional $44,500,000 has been refunded. Any then-remaining balance would be reflected in Account No. 191.

4. If the initial refunds have not been made and the tariff sheets have not become effective on or before October 1, 1989, because Commission's approval has not become final and has been appealed or is subject to appeal, CIG, at its option, shall either make the refunds or pay interest at the Commission approved interest

rate, commencing on October 1, 1989.

5. If the initial refunds have not been made and the tariff sheets have not become effective on or before October 1, 1989, because Commission's approval has not become final, CIG will keep its customers whole with respect to the refunds and enter into negotiations and proceed with diligence to amend the settlement.

6. CIG will be permitted to pay and collect from its customers prices for Program Fund gas up to the maximum lawful prices established in Opinion Nos. 306 and 306-A.

7. The amounts to be refunded will be treated as a below-the-line expense in determining CIG's future costs of service.

8. The refund provided for in this settlement includes, at a minimum, the entire principal amount of refunds required by Opinion Nos. 306 and 306-A attributable to prices paid by CIG for NGPA section 107 "deep" and "tight sands" gas (excess payments).

9. CIG, CIGE, or both, have the right to seek recovery of and retain third party excess payments and related costs from the recipients of those payments and are not required to pass those payments through to their customers.

10. After the Commission's approval of this settlement becomes final and is no longer

subject to appeal, the parties agree to release and discharge each other from claims and causes of action arising out of the 1973 settlement or the Program Fund.

11. The settlement shall be effective as of the date of Commission approval, without any condition unacceptable to the parties as defined in the settlement, becomes final and no longer subject to appeal. After such Commission approval, all parties will file appropriate pleadings withdrawing appeals of Opinion Nos. 306 and 306-A and a motion and proposed order of dismissal will be filed in Case No. 82 CV 10220 before the District Court in and for the City and County of Denver.

Comments on the Offer of Settlement

Staff notes that Commission approval of the settlement will produce immediate benefits for CIG's customers and that the negotiated refund amount of $89 million appears reasonable. Staff, while not opposing the settlement, expresses concerns. Staff asserts that pursuant to Order No. 483, III FERC Stats. and Regs. ¶ 30,778 at 30,870, as codified in section 154.305 of the Commission's regulations,[6] a pipeline is required to maintain refunds, separately in a subaccount of Account No. 191 to be disbursed in cases where the refund balances reach the lesser of one cent per KMBtu of the most recent 12 months of a pipeline's sales or $2 million, in order to reduce deferred account balances and minimize the distortion

[6] 18 C.F.R. § 154.305 (1988).

of current cost signals caused by the amortization of prior period costs by a surcharge. Staff takes the position that the 28.7 cents per Kcf credit is a refund of excess purchased gas costs which requires a waiver of the Commission's regulations.

Staff asserts that in *Tennessee Gas Pipeline Company*, 33 FERC ¶ 61,006 at 61,013 (1983) (*Tennessee*), the Commission rejected a proposed settlement which permitted the pipeline to lower the present PGA gas cost portion of its rates by including in its Account No. 191 surcharge refunds resulting from reductions in non gas costs. Staff concludes that CIG's proposal amounts to using the settlement as a marketing tool contrary to Commission policy. Staff submits that one option available to the Commission is to modify the settlement to require an $89 million cash refund and that CIG could be given the option to make lump sum cash refunds for once a year for the two year period with interest, if it would alleviate a cash flow problem. Staff also asserts that CIG's proposal to defer implementation of the settlement until after a final, non-appealable Commission order is not consistent with the Commission practice of requiring settlements to become effective following a final Commission order on rehearing.

In its initial comments, Natural urges the Commission to approve the offer of settlement, modified in accordance with its suggestions, so that CIG's customers can receive the substantial refunds as soon as possible. Natural asserts that CIG's proposed 18.7 cents per Kcf reduction will provide CIG with a substantial edge in competing for gas sales and ignores the Commission's policy of requiring prompt cash refunds to minimize the distortion of current cost signals, citing Order No. 483, FERC Stats. and Regs. ¶ 30,778 at 30,879. Natural further asserts that the requirement to purchase gas to obtain refunds may result in some customers receiving substantially more

refunds and credits than their overpayment and that even a new sales customer would benefit from the proposal. Natural submits that CIG's proposal is an effort to insulate itself from competition and should be rejected.

Natural contends that the proposed rate reduction will provide no benefit to CIG's customers, such as Natural, who will not renew their service agreements which expire September 30, 1989, or who elect to use CIG as a transporter. Natural further contends that while it made substantial contributions to the gas search program it and similarly situated customers will receive only half of the refund to which it is entitled and that such result is particularly inappropriate when CIG is proposing a take-or-pay recovery mechanism in Docket No. RP89-98 which will require customers whose service agreements expire this year to continue to pay CIG's buyout-buydown costs. Natural proposes that CIG be required to pay to customers an allocated share of the proposed $44.5 million rate reduction based sales volumes for the period November 1, 1979 - December 31, 1988, within 10 days of the expiration of any service agreement reduced by 28.7 cents per each Kcf purchased by each customer at the reduced rate.

In their joint reply comments, CIG, CIGE, and Public Service submit that the proposed settlement is a reasonable resolution of all the issues in this lengthy proceeding and was filed by all active parties to these proceedings and all signatories to the 1973 settlement. CIG, CIGE, and Public Service argue that providing a $44.5 million refund through a rate reduction is an essential aspect of the total settlement package. CIG, CIGE, and Public Service contend that Natural should not be permitted to use the expiration of its service agreement to enhance its position.

CIG, CIGE, and Public Service argue that the

settlement provision which provides the settlement shall become effective after a final, non-appealable Commission order should not be modified. CIG, CIGE, and Public Service state that there are a number of cases where the Commission has approved settlements containing such language.

In its reply comments, Natural states that it supports full cash refunds and that Staff's suggestion of lump sum refunds with interest over a two-year period is acceptable, if modified to specifically state that expiration of a service agreement or a customer's conversion from sales to transportation does not affect the customer's entitlement to full refunds. Natural also states that it supports Staff's position that the settlement be effective on denial of any petition for rehearing. Natural submits that any waiver of Commission regulations be conditioned to require CIG to make full refunds to any customer whose service agreement expires within 10 days of the expiration to allow customers an option to obtain either a reduced commodity rate or an immediate cash refund.

DISCUSSION

After consideration of the proposed settlement and all comments submitted in these proceedings, the Commission adopts the staff's suggested modification requiring a cash refund of the entire $89 million refund amount. The total amount will be refunded to CIG's jurisdictional sales customers based on the sales volumes for the period November 1, 1979 to December 1, 1988, in lieu of the $44.5 million refund through a reduction of 29.7 cents in the non-gas portion of CIG's commodity rates as set forth in Paragraph 2 of the settlement. However, the $89 million cash refund may be made in four equal annual payments with interest calculated in accordance with section 154.67(c) of the Commission's regulations from

the date of this order. The initial payment shall be made at the same time as provided for the proposed $44.5 million cash refund in Paragraph 1 of the settlement with succeeding annual payments on that same date thereafter. The expiration of a service agreement or a customer's conversion from sales to transportation will not affect the customer's entitlement to its share of the refund. The Commission believes that it is appropriate to refund these amounts to these customers rather than adopt CIG's proposed rate reduction. The Commission finds that the settlement as modified is fair and reasonable and in the public interest.

Finally, Staff suggests that a delay in effectiveness of the settlement until a final non-appealable order is inconsistent with current Commission policy. However, in this case, CIG is required to pay interest from the date of this order under the settlement as modified by this order. Thus, there is no need to adopt that proposed modification.

The Commission orders:

(A) The offer of settlement filed on March 13, 1989, in these proceedings is approved as modified by this order.

(B) The Commission's approval of this settlement as modified by this order does not constitute approval of, or precedent regarding, any principle or issues in these proceedings.

(C) Within 30 days from the date of any subject refund payment, CIG must file a refund report. The report must show (1) the amount of principal and interest paid, (2) the dates the refunds were paid, and (3) a statement of concurrence by the purchaser(s).

By the Commission.

/s/ Lois D. Cashell
Lois D. Cashell,
Secretary.

APPENDIX F

BEFORE THE FEDERAL
ENERGY REGULATORY COMMISSION

STIPULATION AND AGREEMENT

THIS STIPULATION AND AGREEMENT is made this 23rd day of February, 1989, between **COLORADO INTERSTATE GAS COMPANY** and its subsidiary, **CIG EXPLORATION, INC. ("CIGE")**, hereinafter referred to collectively (unless the context otherwise indicates) as **CIG', PUBLIC SERVICE COMPANY OF COLORADO ("PSCO"), WESTERN GAS SUPPLY COMPANY, CHEYENNE LIGHT, FUEL & POWER COMPANY,** hereinafter referred to collectively as "PSCO Group," **THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, THE CITY AND COUNTY OF DENVER** and **THE CITY OF COLORADO SPRINGS.**

WITNESSETH:

WHEREAS, there recently was pending before the Federal Energy Regulatory Commission ("**FERC**" or Commission") in Docket Nos. CP73-184-002 and C173-485-002 certain matters concerning the pricing, operation and final accounting regarding the "Gas Search Program and Gas Search Program Fund" established under the 1973 Stipulation and Agreement of Settlement ("1973 Stipulation") approved by the Federal Power Commission in Docket Nos. CP73-184-002 and C173-485-001; and

WHEREAS, an Initial Decision of the Administrative

Law Judge dated July 24, 1985 (32 FERC ¶ 63,033), FERC Opinion No. 306 dated July 7, 1988 (44 FERC ¶ 61,023) and FERC Opinion No. 306-A dated November 28, 1988 (45 FERC ¶ 61,293) have been issued in said dockets after five days of hearings and the receipt of 130 exhibits therein; and

WHEREAS, said **FERC** decisions are ripe for appeal and appropriate pleadings seeking judicial review have been filed by all signatory parties to the 1973 Stipulation and the City of Colorado Springs (an intervenor in these proceedings); and

WHEREAS, all of the signatory parties to the 1973 Stipulation and the City of Colorado Springs have agreed to resolve these issues in these proceedings as herein set forth.

NOW, THEREFORE, for and in consideration of the promises, covenants and conditions hereinafter set forth, and intending to be legally bound hereby upon FERC approval of this Stipulation and Agreement ("1989 Stipulation"), without unacceptable condition, becoming final and no longer subject to appeal, CIG, the PSCO Group, the Public Utilities Commission of the State of Colorado, the City and County of Denver and the City of Colorado Springs agree as follows:

1. Within ten (10) days of FERC approval of this 1989 Stipulation, without unacceptable condition, becoming final and no longer subject to appeal, CIG shall refund to its jurisdictional sales customers the amount of forty-four million five hundred thousand dollars ($44,500,000). This refund shall be allocated among such

customers based upon sales volumes for the period from November 1, 1979 to December 31, 1988, as shown on the attached Appendix "A."

2. CIG shall refund an additional forty-four million five hundred thousand dollars ($44,500,000) to its jurisdictional sales customers by reducing the non-gas cost portion of its commodity rates by the amount of twenty eight point seven cents (28.7 cents) per . Attached as Appendix "B" are *pro forma* tariff sheets reflecting implementation of such reduction. By the first day of the first month following the date FERC approval of this 1989 Stipulation, without unacceptable condition, becomes final and no longer subject to appeal, CIG shall file with the FERC tariff sheets in the form set forth in Appendix "B." Such tariff sheets shall be effective on the first day of the second month following the date upon which FERC approval of this 1989 Stipulation, without unacceptable condition, becomes final and no longer subject to appeal. Such tariff sheets are anticipated to be in effect for a period of approximately twenty-four (24) months thereafter. When CIG anticipates that said additional forty-four million five hundred thousand dollars ($44,500,000) will e totally refunded to CIG's jurisdictional sales customers, whether earlier or later than the twenty-four (24) month period, the tariff sheets shall expire, and the then-remaining balance, if any, shall be reflected in FERC Account 191. By this Stipulation CIG shall not be precluded from filing for any rate changes authorized by its tariffs, the Natural Gas Act, the Natural Gas Policy Act ("NGPA"), successor legislation to either such acts, or FERC regulations. The *pro forma* tariff sheets attached as Appendix "B" are filed subject to any changes in CIG's rates that may occur prior to the date that FERC approval of this 1989 Stipulation becomes final and no longer subject to appeal. The entire rate reduction provided in this paragraph will be

achieved by deductions from the non-gas cost portion of CIG's commodity rates. Any reductions in or additions to gas purchase costs will be passed through the Purchase Gas Adjustment provisions of CIG's tariff ("PGA") to the customers of CIG in the normal manner, except as provided in Paragraph 6 below. Except as provided in Paragraph 6 below, this 1989 Stipulation is not an admission by CIG of any impropriety in the pricing, operation or final accounting regarding the Gas Search Program Fund or any other matter, but reflects instead a desire by all parties to settle the differences presently at issue between them.

3. The parties hereto agree to pursue final FERC approval of this 1989 Stipulation so that the rate refunds described in Paragraphs 1 and 2 above may, consistent with the other provisions of this 1989 Stipulation, be placed into effect no later than October 1, 1989, and in the event this has occurred because FERC approval of this 1989 Stipulation, without unacceptable condition, has become final but has been appealed or is still subject to appeal as of October 1, 1989, then CIG, at its option, shall make said refunds or shall pay interest, at the FERC-approved interest rate, commencing October 1, 1989 through the date when the Paragraph 1 refunds are made and the Paragraph 2 tariff sheets have become effective.

In the event the refunds described in Paragraph 1 have not been made and the tariff sheets described in Paragraph 2 above have not become effective on or about October 1, 1989, and in the event this has occurred because FERC approval of this 1989 Stipulation, without unacceptable condition, has not become final as of October 1, 1989, then the parties hereto agree that CIG will keep its customers whole with respect to the refunds described in Paragraphs 1 and 2 for the period commencing October 1, 1989 through the date when the

Paragraph 1 refunds are made and the Paragraph 2 tariff sheets have become effective, and shall enter into good faith negotiations and proceed with due diligence to amend this 1989 Stipulation to accomplish same.

4. CIG will be permitted to pay and collect from its customers prices for Gas Search Program Fund gas up to the maximum lawful prices set forth in FERC Opinion Nos. 306 and 306-A.

5. The amounts to be refunded pursuant to Paragraphs 1 and 2 above shall be treated as a below-the-line expense in determining CIG's future cost of service.

6. The parties hereto acknowledge and agree that the eighty-nine million dollar ($89,000,000) refund provided for in this 1989 Stipulation is the result of negotiations. Nevertheless, the parties hereto also recognize that this sum includes at a minimum the entire principal amount of refunds required by FERC Opinion Nos. 306 and 306-A attributable to prices paid by CIG for NGPA Section 107 "deep" and "tight sands" gas. (Excess Payments"), including Excess Payments made to producers other than CIGE ("Third Party Excess Payments"), as well as the principal amount of all taxes, royalties and other costs paid by CIG and/or CIGE related to Excess payments ("Related Costs"). The parties further agree that CIG and/or CIGE has the right to seek recovery of and retain Third Party Excess Payments and Related Costs from those persons or entities in receipt of same. Accordingly, the parties hereto agree that in order to avoid the possibility of a duplicate refund by CIG to its customers due to the normal operation of CIG's PGA, or due to any other rule or regulation, notwithstanding any contrary tariff provision, rule or pass through to its customers) any Third Party Excess Payments and

Related Costs (together with any interest recovered thereon) which CIG and/or CIGE may recover back from such persons or entities.

7. CIG will provide the other parties to this 1989 Stipulation with access to documentation sufficient to verify compliance by CIG and/or CIGE with the terms of this 1989 Stipulation.

8. Effective upon the tenth (10th) day following the date upon which FERC approval of t his 1989 Stipulation, without unacceptable condition, becomes final and no longer subject to appeal, the parties hereto release and forever discharge each other and each party's successors and assigns (whether such party acquired its interest in any property subject to the Gas Search Program before or after the effective date of this 1989 Stipulation) from any and all claims and causes of action known or unknown, discovered or undiscovered, fixed or contingent, which arise out of the 1973 Stipulation or the Gas Search Program Fund whether or not the same were raised or could have been raised in FERC Docket Nos. CP73-184-002 and C173-485-002 or before the District Court in and for the City and County of Denver in Case No. 82 CV 10220. This includes but is not limited to the undeveloped lease valuation issue discussed at 32 FERC pp. 65,136-37 of the Initial Decision, but excludes claims and causes of action by CIG and/or CIGE for the recovery of Third Party Excess Payments and Related Costs as provided in Paragraph 6 above. Further, the parties hereto shall be deemed to have withdrawn any issues arising from or related to the Gas Search Program Fund from all CIG FERC proceedings in which they have been raised and no party shall raise directly or indirectly, any such issue in any future proceedings.

9. This 1989 Stipulation shall be effective as of the date FERC approval, without unacceptable condition, becomes final and no longer subject to appeal. If the FERC issues an order denying approval of this 1989 Stipulation, approves portions of this 1989 Stipulation and not others, or approves this 1989 Stipulation with conditions which approval, disapproval or conditions are unacceptable to any of the parties hereto, this 1989 Stipulation shall be null and void. Provided, however, that neither the previous sentence nor the other 'unacceptable condition' provisions of this 1989 Stipulation shall apply unless one or more of the parties hereto has provided written notice to all other parties hereto, within thirty (30) days of the date of FERC approval, that it believes such approval, disapproval or conditions are unacceptable. Within ten (10) days of FERC approval without unacceptable conditions of this 1989 Stipulation becoming final and no longer subject to appeal, all parties will file appropriate pleadings withdrawing appeals of Opinion Nos. 306 and 306-A and the PSCO Group will file a Motion and proposed Order of Dismissal with Prejudice in its action against CIG and CIGE in Case No. 82 CV 10220.

10. The various provisions of this 1989 Stipulation are not severable and, unless this 1989 Stipulation is allowed to become effective by the FERC, it shall be privileged and not admissible in evidence or in any way described or discussed in any proceeding hereinafter.

11. Except as otherwise expressly provided for in this 1989 Stipulation, no party to these proceedings shall be deemed to have approved, accepted, agreed to, or consented to any legal or rate making principle, valuation methodology, or any allocation method or rate design formula underlying or supposed to underlie any of the rates provided herein. The

parties also understand that the Commission's approval of this 1989 Stipulation will not constitute approval of, or precedent regarding, any principle or issue in Docket No. CP73-184-002 or C173-485-002.

12. Upon acceptance hereof by final order of the Commission, the proceedings at FERC Docket Nos. CP73-184-002 and C173-485-002 shall terminate.

13. In the event of an express conflict between the terms hereof and the terms of the 1973 Stipulation, the terms hereof shall control. In all other respects, the terms of the 1973 Stipulation shall remain in full force and effect.

14. The parties herein request that the Commission grant such waivers and special permissions with respect to the provisions of CIG's FERC Gas Tariff and the Commission's Regulations, to the extent necessary, to effectuate all the provisions hereof.

IN WITNESS WHEREOF, Colorado Interstate Gas Company, CIG Exploration, Inc., Public Service Company of Colorado, Western Gas Supply Company, Cheyenne Light, Fuel & Power Company, the Public Utilities Commission of the State of Colorado, the City and County of Denver and the City of Colorado Springs have caused this 1989 Stipulation to be duly executed by its respective corporate officers, as of the date first above written.

ATTEST:	COLORADO INTERSTATE GAS COMPANY
/s/ [Illegible] Asst. Secretary	/s/ [Illegible] Name JON R. WHITNEY itle Executive Vice President
ATTEST:	CIG EXPLORATION, INC.
/s/ [Illegible] Asst. Secretary	/s/ [Illegible] Name JON R. WHITNEY Title Senior Vice President
ATTEST:	PUBLIC SERVICE COMPANY OF COLORADO
/s/ [Illegible] Secretary	/s/ [Illegible] Name A. E. MIDDENTS Title Senior Vice President
ATTEST:	WESTERN GAS SUPPLY COMPANY
/s/ [Illegible] Secretary	/s/ [Illegible] Name A. E. MIDDENTS Title President

ATTEST:

CHEYENNE LIGHT, FUEL & POWER COMPANY

/s/ [Illegible]
Secretary

/s/ [Illegible]
Name A. E. MIDDENTS
Title Vice President

ATTEST:

THE PUBLIC UTILITIE COMMISSION OF THE STATE OF COLORADO

/s/ [Illegible]
Secretary

/s/ [Illegible]
Name ARNOLD H. COOK
Title Chairman

ATTEST:

THE CITY AND COUNTY OF DENVER

By: /s/ [Illegible]
Deputy City Clerk

/s/ [Illegible]
Name FEDERICO PEÑA
Title Mayor

ATTEST:

THE CITY OF COLORADO SPRINGS

/s/ [Illegible}
Witness

/s/ [Illegible]
Name HAROLD E. MISKEL
Title Acting Utilities Director

[City and County of Denver Seal]
[Originally Attached Appendices Omitted in Printing]